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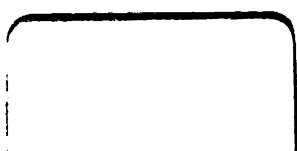
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THE

REVISED REPORTS

BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

AS ARE STILL OF PRACTICAL UTILITY.

EDITED BY

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OF THE INNER TEMPLE, ESQ.

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PREFACE TO VOLUME L.

Calder v. Halket, the first case in the volume, contains an important (though in England not strictly authoritative) exposition by Baron Parke of the limits of judicial immunity. *England v. Downs*, p. 268, is a leading case on the subject, all but obsolete, of "fraud on marital right."

In *Society of Practical Knowledge v. Abbott*, p. 288, Lord Langdale went as near as an English Judge could be expected to go to having a theory on the nature of a corporation. He was quite clear that a corporation must be treated as having some kind of existence distinct from that of its individual members, any or all of them. But he forbore, perhaps wisely, to consider of what kind corporate existence is; whether, for example, it is correct to ascribe it, according to the theory held until lately by most authors in the civil law, to a legal fiction authorized by the State. Now an increasing school maintains that a corporation is quite as real as an individual (see Gierke, transl. with introduction by Prof. Maitland, *Political Theories of the Middle Age*, Cambridge, 1900), while one or two daring controversialists protest on the contrary that a corporation is nothing at all, not even a fiction.

Haigh v. Brooks, p. 399, is a regular illustration in the text-books of the rule that the Court will not discuss the adequacy, as distinct from the legal validity, of the consideration for a promise. "Don't traverse the amount, sir; it's not material," as an old pleader on the Northern Circuit said to an ostler who tried to justify his neglect by raising the irrelevant question whether the pleader had given him a shilling or sixpence.

Dalton v. Gib, p. 656, was decided by the same Court and in the same term with *Brayshaw v. Eaton*, p. 671, which is still good law, though covered by later authority; the two cases are preserved together to illustrate the history of judicial opinion on the subject of necessities for infants.

The direction to the jury that "they must look to the apparent station and circumstances of the party" is clearly wrong according to the modern authorities confirmed by the Sale of Goods Act, 1893, s. 2, which uses the words "actual requirements": and the reasoning of the Judges in banc, which amounts to inventing a new kind of liability by "holding out" to bind an infant to pay for goods which are not necessities, cannot be now approved. They almost say that a female infant's condition in life is, as against her, conclusively proved by the appearance of her mother. The source of the fallacy was the notion that the right to recover for necessities depended on the vendor having reasonably supposed them to be necessary; and that notion arose from omitting to observe that the policy of this exception to an infant's incapacity for contracting is for the benefit of the infant and not of the vendor, and has nothing to do with the vendor's merit. Now it is clearly not for the benefit of infants that they should be able to bind themselves to pay for goods not because the goods really are necessary, but because they appear to the vendor so to be. *Brayshaw v. Eaton*, on the other hand, is quite sound so far as it goes, the true doctrine being that neither the knowledge of the seller as to the infant buyer's circumstances and existing supplies, nor his diligence or want of diligence in informing himself, can make any difference. The Court, however, seem to have allowed greater latitude to the jury than is allowable in our time since the leading decision in *Ryder v. Wombwell*, L. R. 4 Ex. 32. Whether the verdict of the jury in either *Dalton v. Gib* or *Brayshaw v. Eaton* was right or not, on the relevant evidence, is a question neither calling for nor capable of solution.

He that would understand why the frequent plea of *liberum tenementum* in the old action of ejectment was a good special plea, and not bad for amounting to the general issue, let him perpend the judgment of the Court in *Doe v. Wright*, at p. 547. The principles involved are less obsolete than they look. *Jones v. Waite*, p. 705, is one of the series of authorities which broke down the old assumption that the law would not recognize for any purpose an agreement for separation between husband and wife.

F. P.

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OF THE

HIGH COURT OF CHANCERY.

1838—1840.

(1 & 2 VICT.—3 & 4 VICT.)

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LORD LANGDALE, 1836—1851	. . .	<i>Master of the Rolls.</i>
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 SIR THOMAS WILDE, 1839—1841 . . . }

(1) The description of Mr. Justice Erskine as a knight in the earlier volumes of Manning and Granger's Reports was erroneous. As a peer's son he would not have been knighted in the ordinary course; and the lists of the Judicial Committee in Moore's Privy Council Reports, and of the Benchers of Lincoln's Inn in the Law List down to 1863 (confirmed by the description of the Right Hon. Thomas Erskine in a deed of which a copy is before me), show that in fact he was not.—F. P.

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NOTE.

The first and last pages of the original report, according to the paging by which the original reports are usually cited, are noted at the head of each case, and references to the same paging are continued in the margin of the text.

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ERRATUM.

Page 249, for "See post, p. 355" read "See 51 R. R. p. 389."

that fact.

THIS was an action of trespass, brought by the appellant against the respondent, in the Supreme Court *of Judicature, at Fort William, to recover damages for the arrest and false imprisonment of the appellant, by the respondent, in his character of Judge and magistrate of the Foujdarry (5) Court of the Zillah of Nuddeah, in Bengal.

[*29]

The appellant was the manager of a factory at Bayadangah,

(1) Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, the Right Hon. Dr. Lushington.

(2) Cited in *Sinclair v. Broughton* (1882) 47 L. T. 172.

(3) See now Act XVIII. of 1850; *Vinayab Disákar v. Báí Itchá*, 3 B. H. O. Appendix 36, *Collector of*

Sea Customs v. Punniar Chithambaram, I. L. R. 1 Mad. 89, *Ragunáda Rau v. Nathamunt*, 6 M. H. C. 423.

(4) See *Anderson v. Gorrie* [1895] 1 Q. B. 668; 71 L. T. 882, C. A., and cases there collected.

(5) Criminal.



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BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE, BENGAL (1).

JOHN CALDER *v.* ROBERT CRAIGIE HALKET (2).

(3 Moore, P. C. 28—79.)

The 21 Geo. III. c. 70, s. 24, protecting provincial magistrates in India from actions for any wrong or injury done by them in the exercise of their judicial offices (3), does not confer unlimited protection, but places them on the same footing as those of English Courts of a similar jurisdiction (4), and only gives them an exemption from liability when acting *bonâ fide* in cases in which they have mistakenly acted without jurisdiction.

Trespass will not lie against a Judge for acting judicially, but without jurisdiction, unless he knew, or had the means of knowing, of the defect of jurisdiction, and it lies upon the plaintiff, in every such case, to prove that fact.

THIS was an action of trespass, brought by the appellant against the respondent, in the Supreme Court *of Judicature, at Fort William, to recover damages for the arrest and false imprisonment of the appellant, by the respondent, in his character of Judge and magistrate of the Foujdarry (5) Court of the Zillah of Nuddeah, in Bengal.

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(4) See *Anderson v. Gorrie* [1895] 1 Q. B. 668; 71 L. T. 382, C. A., and cases there collected.

(5) Criminal.

1839.
Dec. 5.
1840.
July 4, 8.
Dec. 17.
PARKE, B.
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in the same Zillah, belonging to Mr. David Andrews. Both the appellant and respondent were European British-born subjects. The proceedings which gave rise to the imprisonment complained of, were as follows :

On the 29th of July, 1834, an affray took place in a village called Dutt Boahleah, within the Zillah of Nuddeah. On the following day, the police Darogah of the adjoining Thanah (1) of Hanskolly, within which the village of Boahleah is situate, reported the particulars of the riot to the respondent, as acting magistrate of the Foujdarry Court of the Zillah of Nuddeah, and transmitted the depositions of the wounded persons as well as of some of the witnesses of the affray.

The respondent, Mr. Halket, being of opinion that the appellant was concerned in the riot, directed a Robocarree (2) (or order of instructions for the mode of proceeding in the case) of the Foujdarry Court at Kishnaghur, to be made and passed, by which it was ordered, amongst other things, that a Perwannah should be written and directed to the Darogah, for the apprehension of Mr. Calder.

The Robocarree was signed by the respondent, and a Perwannah was accordingly issued on the same day, and delivered to the Darogah of the Thanah of Hanskolly. Under the authority of which, the appellant *was detained, and kept under surveillance of two Burhurdanzas (3), within the boundaries of Mr. Andrews's factory.

The appellant was ultimately brought before Mr. Halket, the respondent, as acting Judge of the Foujdarry Court at Kishnaghur, and after some days' investigation, admitted to bail ; and was eventually bound by recognizance, to appear when called upon. The greater part of the other prisoners charged with being concerned in the riot, were convicted, and sentenced to different periods of imprisonment : but no further proceedings were taken against Mr. Calder.

Upon the 6th of March in the following year, 1835, Mr. Calder commenced an action of trespass, in the Supreme Court at Calcutta, against Mr. Halket, for assault and false imprisonment. The declaration contained three counts. The first alleged that the respondent assaulted and imprisoned the appellant for thirty-four days, at Bayadangah. The second, that the respondent had laid hold of the appellant, and compelled him to go from a house in Bayadangah to a place called Poolia, and from Poolia back to Bayadangah, and then to Kishnaghur, and there imprisoned him for twenty-five days. And the third count alleged that the

(1) Police station.

see Wilson's Glossary s.v.—F. P.

(2) Corruptly written for *rūbakāri* :

(3) Matchlock-men.

respondent had assaulted and imprisoned the appellant at Kishnaghur, for thirty-four days.

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The respondent pleaded the general issue; and also six special pleas, justifying the said several arrests and imprisonments, as done by him as magistrate of the district of Nuddeah, in the province of Bengal, and of the Criminal Court of the same district.

The appellant joined issue upon the first plea, and replied *de injuria* to the six special pleas upon which issue was joined.

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The cause came on for trial before the Supreme Court, on the 23rd of July, 1835, when several witnesses were examined on both sides, and a verdict was given for the plaintiff, on all the issues joined in the action, with damages to the amount of five hundred sicca rupees, but with liberty for the respondent to move that the verdict should be set aside, and a nonsuit, or verdict for the respondent, entered instead thereof, upon three several points reserved, viz., 1st, That there was no proof of the arrest of the appellant by the respondent's order; 2ndly, That under the provisions of the statutes 21 Geo. III. c. 70, sec. 24, and 53 Geo. III. c. 155, sec. 105, and the Bengal Regulations in force in the Presidency, the respondent was not liable to the Supreme Court in an action for damages; the acts proved appearing in evidence to have been acts done by him as magistrate of the provincial Court of Kishnaghur; and, 3rdly, that under the general issue a sufficient justification was proved.

A rule *nisi* to that effect was granted on the 2nd of November.

On the 24th of November, 1835, the several points reserved were argued before the Supreme Court, who were of opinion, that the arrest having taken place under the seal of the Foujdarry Court, and the appellant being a British-born subject, and not amenable to the jurisdiction of the Foujdarry Court of the Zillah, the respondent had failed to support his special pleas. They were, however, of opinion, that under the general issue, the respondent was entitled to avail *himself of the protection of the 24th section of the statute 21 Geo. III. c. 70, which precluded the Supreme Court from holding jurisdiction in the action against the respondent, and accordingly adjudged that the verdict should be entered for the respondent on the general issue, with costs, and costs of motion.

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From this judgment the appellant appealed to her Majesty in Council.

Mr. M. D. Hill, Q. C., and *Mr. C. Buller*, for the appellant :

The judgment of the Supreme Court cannot stand; they admit

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the trespass, but say they have no jurisdiction to try the question, the respondent having acted in his magisterial capacity, and not being amenable to the Supreme Court. This is contrary to law, as well as against the true construction of the Acts 21 Geo. III. c. 70, and 53 Geo. III. c. 155. The rule at law is, that if an action be brought against a Judge of Record for an act done by him in his judicial capacity, he must plead that he did such act as a Judge of Record before he can avail himself of such justification (1). The respondent pleaded the general issue. Now supposing him to be a Judge of Record, that is clearly insufficient; but he also pleaded specially, that the acts were done by him in his magisterial capacity; yet the Court held these pleas were not supported, but they held the plea of the general issue sufficient, under the 21 Geo. III. c. 70, ss. 2 and 24. That Act was passed to explain and amend the previous one of 13 Geo. III. c. 63, under which the Supreme *Court was first established; by the second section it is provided, that persons impleaded in the Supreme Court, for acts done by order of the Governor-General in Council, may plead the general issue. But the trespass of the respondent was not an act so done. The respondent is a Judge of the Foujdarry Court, and, according to the Bengal Regulation I. of 1772 (2), first establishing that Court, but an officer of police, having no jurisdiction over any but natives; and though appointed by the Governor-General in Council, the acts done by him in his judicial capacity never can be construed to be acts done by the order of the Governor-General, so as to entitle him to plead the general issue. The 24th section of the Act recites, that whereas it is reasonable to render the provincial magistrates, as well native as British-born subjects, more safe in the execution of their office, it is enacted that no action for wrong or injury shall lie in the Supreme Court, against any person whatsoever exercising a judicial office in the country Courts, for any judgment, decree, or order of the said Court, nor against any person for any act done by or in virtue of the order of the said Court. Now, in the first place, this clause applies to the orders of the Court, and not to the individual acts of the Judge; and, in the next place, the judgments, orders, or decrees, intended by the Legislature, are such as the judicial officer has authority to exercise, viz., over natives, and not over British subjects, who are not subject or amenable to the jurisdiction of the provincial

(1) Lord MANSFIELD, in *Mostyn v. Fabrigas*, 1 Cowp. 172.

(2) Judicial Regs. of 1769 to 1792, para. 5.

magistrates. Here the respondent, a Mofussil magistrate, issues a Perwannah *for the arrest of the appellant, a British-born subject, without the oath of any party being taken, without any charge made, without any accusation, or even accuser, but solely on his own suspicion, drawn, it may be, from the report of the Darogah, but of which the respondent is in utter ignorance. The Act of 21 Geo. III. c. 70, was never intended for such a case as this, nor can it be strained to meet it. If the construction given by the Supreme Court to the 24th section be correct, the appellant will be without redress at law; he cannot sue the respondent in the district in which the acts happened, and the native Courts of Sudder and Nizamut are Courts of Appeal without original jurisdiction. The consequence will be, that the local magistrates in India will enjoy a protection and immunity not possessed by a Judge of the highest Court of Record in England.

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Then it is said that the respondent, being a justice of the peace, had jurisdiction under the 53 Geo. III. c. 155, s. 105 (1); but that clause applies only to cases of arrest of a party complained of, after the case has been heard and decided, and a fine imposed and not paid, and no property found within the district from which such fine could be levied. The question then is, whether the respondent, being, as it is admitted, a justice of peace, and as such amenable to the Supreme Court, can be permitted to say that the act done by him was in his capacity of Judge of the Foujdarry Court, and not as a magistrate, and that as such Judge he is entitled to plead the general issue, and to the protection of the 21 Geo. III. c. 70. We do not contend that an action would lie against the respondent acting within his jurisdiction; the statute 21 Geo. III. *c. 70, protects the Judges of the native Courts in India in the same manner as those of 7 Jac. I. c. 5 (2), 21 Jac. I. c. 12, s. 15 (2), and 42 Geo. III. c. 85, s. 6 (2), protect the Judges of our own Courts; but if the act done be out of the jurisdiction of the Judge, then he is not protected: *Bushel's* case (3); *Hamond v. Howell* (4), *Miller v. Seare* (5). This doctrine was admitted in *Dicas v. Lord Brougham* (6), and formed the basis of the decision in *Mostyn v. Fabrigas*. If an act is done by a Judge as Judge of Record, in his judicial capacity, then no action will lie against him: *Groenvelt v. Burwell* (7). But the Foujdarry Court is not

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(1) Rep. S. L. R. Act, 1890.

(2) See now the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

(3) 1 Mod. 119.

(4) 1 Mod. 184, and 2 Mod. 218.

(5) 2 W. Bl. 1141.

(6) 6 Car. & P. 249.

(7) 1 Ld. Ray. 454; 1 Salk. 200.

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a court of record, it is the native Criminal Court, created under the Regulation of 1772, at the same period as the Sudder, which has been held, as we are instructed, by the Supreme Court of Calcutta, not to be a court of record. If a party not being a Judge of a court of record improperly grants a warrant, on which another is imprisoned, an action lies, *Beardmore v. Carrington* (1), *Burdett v. Abbot* (2), and he must plead specially. Now though the warrant is sealed with the seal of the Foujdarry Court, the act of granting it was a ministerial and not a judicial act, and being an excess of jurisdiction, an action will lie for it: *Beaurain v. Scott* (3). The distinction between a ministerial and judicial act was taken and insisted on with great learning and ability in a case in the Court of Common Pleas in Ireland, *Taafe v. Downes*, Chief *Justice of the King's Bench (4). The plaintiff having been arrested upon a warrant from the Chief Justice, brought an action of assault and for false imprisonment, to which the defendant pleaded that he was *Chief Justice of the King's Bench, and that as such, and in the course of his office of Chief Justice, issued his warrant. The plaintiff demurred, because the defendant did not justify by his plea, the issuing the *warrant, by setting forth the causes for which, as well as the authority under which, it was issued. The case was elaborately argued by the most eminent men at the Irish Bar, and though the Court gave *judgment against the demurrer, one of the Judges, Mr. Justice FLETCHER, being dissentient, yet the distinction between the ministerial and judicial acts of a Judge, which formed the ground of his dissent, was *not controverted by the other Judges, who only held that the act in question was legal, and could not be questioned because it was a judicial act. The Chief Justice, however, was a Judge of Record; even, therefore,

(1) 2 Wilson, 244.

(2) 12 R. B. 450 (14 East, 1).

(3) 14 R. B. 759 (3 Camp. 388).

(4) The case of *Taafe v. Downes*, Chief Justice of the King's Bench, in Ireland, was published in 1815, as a separate report, by Mr. Hatchell, a barrister—no regular reports of the Court of Common Pleas in Ireland existed at that time, and Mr. Hatchell's book being out of print, and extremely scarce, the Editor [*i.e.* Mr. Moore, the reporter of the principal case] ventures to think that a case on so important a point, involving so

much constitutional law, ought to be preserved, and that an epitome of it will not be unacceptable to the profession. The limits of a note have compelled the omission of the arguments of counsel, as well as the judgment of Mr. Justice FLETCHER, who differed from the other Judges of the Court; but the authorities relied on, both at the Bar and by the learned Judge, are set out, and the judgment of the other Judges taken, from a copy of Mr. Hatchell's Report, in the Editor's possession. (See p. 14, below.)

*admitting the case to have decided that a Judge could not be questioned for an act ministerial, but in the nature of a judicial act, that decision cannot be relied on here, for there is no pretence for saying that *the Foujdarry Court is a court of record; or its Judges any thing higher than our justices of the peace. In *Tate v. Chambers* (1), where a magistrate committed a man under 39 & 40 Geo. III. c. 99, s. 8, (the *Pawnbrokers' Act,) for re-examination upon a charge of embezzlement, and not of penalty, as provided by the Act, the magistrate was held liable to an action for exceeding his jurisdiction. The proceeding of the *respondent was an act *in pais* and not of record, for which he is not amenable, if he has exceeded his jurisdiction; this, we maintain, he clearly has done; the judgment therefore entered up by the Supreme *Court for the respondent on the general issue must be reversed, and the cause remitted back to the Court to assess the damages due to the appellant, for the wrong and injury he has sustained.

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Spankie, Serjt., Sir William Follett, Q. C., and Mr. Greenwood,
for the respondent :

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The action of trespass brought against the respondent *by the appellant, was not sustainable in the Supreme Court, for two reasons; first, because the respondent, acting *bonâ fide* in the execution of his office as magistrate of the Foujdarry Court, in a case *within the jurisdiction of that Court, is protected by the statutes 21 Geo. III. c. 70, ss. 2 & 24, and 53 Geo. III. c. 155, s. 105; and secondly, because it did not appear upon the trial, nor was there any *ground for the Court to presume, that the respondent had any notice of the fact, or any reason to suppose that, the appellant was not a native, and as such amenable to the jurisdiction of the Foujdarry Court. *The sections 2 & 24 of the 21 Geo. III. c. 70, must be taken together; the latter provides that no action shall lie in the Supreme Court against any person whatsoever exercising a judicial office in the country *Courts for any judgment, decree, or order, of the said Court; and by the former, any person impleaded in the Supreme Court for any act done by order of the Governor-General in Council, may plead the general *issue. Now it is admitted that the parties engaged in the riot were natives, and as such amenable to the jurisdiction of the native Courts. The appellant was the

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exception; he, it seems, was an European *and a British subject; but how was Mr. Halket to know that circumstance? his name would not necessarily import the fact,—he might be half-caste: it is clear that he was engaged with others, who were amenable *to the jurisdiction of the Foujdarry Court, in a common breach of the law; when, therefore, he was apprehended, if he intended to avail himself of his privilege as a British subject, he should have moved for *a warrant to be discharged; that would have been the course here; and if he had that remedy, can he lay by, and then bring his action? But if a magistrate acts *bonâ fide*, he is protected against all unintentional *errors; that is the principle upon which all the Acts of Parliament for their protection are framed; and the decisions of the Courts are in accordance with that principle: *Weller v. Toke* (1), *Beechey v. Sides* (2), *Price v. Messenger* (3). The 7 Jac. I. c. 5, made perpetual by 21 Jac. I. c. 12, first enabled an officer impleaded for the execution of his office, to plead the general issue. By the 42 Geo. III. c. 85, s. 6, this provision *was extended to all persons having, holding, or exercising public employment in or out of the kingdom, and who by law are empowered to commit persons to safe custody; so that, independent of the *statute 21 Geo. III. c. 70, the respondent, being a person having legal authority to commit, if sued in this Court, might have pleaded the general issue: but it is said, that this arrest of the appellant was not *within the intent or meaning of 21 Geo. III. c. 70. The instrument of arrest is a Perwannah, which is something more than a warrant, for it sets forth the report of the Darogah on which it is founded, and then *proceeds to order the arrest of the parties implicated in the riot, who are to be detained until the arrival of the presence, that is, the Judge, and not brought, as would be the case here, immediately before him for *examination. It is an order, and being sealed with the seal of the Court, must be taken to be an order of the Court, and as such is precisely within the 24th sect. of the Act 21 Geo. III. c. 70. Then is Mr. *Halket liable to an action of trespass for excess of jurisdiction in a matter over which he had already, as respected the natives, jurisdiction, without notice of the appellant's character of a British subject? That *is contrary to the principle of all the cases. If a Judge having jurisdiction, exceed it by mistake, no action can be maintained against him: *Gwynn v. Poole* (4), *Truscott*

(1) 9 East, 364.

(2) 33 R. R. 333 (9 B. & C. 806).

(3) 5 R. R. 559 (2 Bos. & P. 158).

(4) Lutch. 937.

v. Carpenter (1), *Lowther v. Earl of Radnor* (2). *In *Dicas v. Lord Brougham* there was no special plea, the plea of the general issue was held sufficient. If there is a general law, as an Act of Parliament, the Court are bound to take notice of it; it need not be *pleaded in abatement; that was settled in *Parker v. Elding* (3), and has been followed by *West v. Turner* (4). The effect of reversing the judgment of the Supreme Court would be to allow actions to be brought against *individual Judges for the acts of the Court; that is plainly contrary to every *dictum* and decision to be found. The judgment, therefore, of the Court below must be affirmed, and the appeal dismissed with costs.

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Mr. Hill, in reply :

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The construction put upon the 21 Geo. III. c. 70, is inconsistent with the provisions of the Act itself. It *is contended that by the 24th section, judicial officers are indemnified from any proceedings in respect of acts done by them as such; but the two succeeding sections provide for the case of informations being brought *against them for corrupt acts. The argument puts them too high: they may be indicted; is that consistent with their being Judges of Record, and as such protected? The Judges of the Court of Record here *can only be proceeded against by impeachment; they are amenable to Parliament alone for their acts; are the Judges of the Foujdarry Court in India on the same footing? In the 53 Geo. III. c. 155, s. 105, *the local Courts are described as established by the East India Company; they are not King's Courts in the sense of the Superior Courts here; and if not King's Courts, then they have only a local and limited *jurisdiction, and their Judges must be accountable for any excess in the exercise of it. If a Judge acts in a matter or subject in which he has no jurisdiction, he is liable to an action; but if he has jurisdiction, though he proceed erroneously, no action will lie,—that was the distinction taken in the *Marshalsea* case (5), and by *HOLT*, Ch. J., in *Groenvelt v. Burwell*; by *POWELL*, B., in *Gwynn v. Poole*; and by *DE GREY*, Ch. J., in *Miller v. Seare* (6); and was the foundation of the more modern case of *Ackerley v. Parkinson* (7). The argument that the respondent had jurisdiction over natives, cannot be carried to give

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[*73]

(1) *Ld. Ray.* 229.

(2) 8 *East*, 113.

(3) 1 *East*, 352.

(4) 6 *Ad. & El.* 614.

(5) 10 *Co. Rep.* 69, 76, 2nd Res.

(6) 2 *W. Bl.* 1145.

(7) 16 *R. R.* 317 (3 *M. & S.* 411).

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him any over British subjects, who are expressly exempted from the operation of the native Courts. The arrest of the appellant was not a judicial act, or founded on any judicial proceeding. The respondent had no right to do more than issue a summons; and immediately he found that the appellant was a British subject, he must have been discharged. He began by exceeding his authority as a magistrate, acting judicially when he ought only to have acted ministerially, and proceeding summarily when he ought first, at least, to have inquired and ascertained that he had jurisdiction to act at all; he is, therefore, not entitled to any privilege, and ought not to be screened from the consequences of his own deliberate act.

1840.
Dec. 17.

PARKE, B.:

[*74]

The material question in this case is, whether the defendant, being a Judge of the Foujdarry Court of the Zillah of Nuddeah, was, in that character, entitled to *the protection of the 21 Geo. III. c. 70, s. 24, for issuing his order, or Perwannah, and for what was done in obedience to it.

This section is as follows: "And whereas it is reasonable to render the provincial magistrates, as well natives as British subjects, more safe in the execution of their office, be it enacted, That no action for wrong or injury shall lie in the Supreme Court against any person whatsoever, exercising a judicial office in the country Courts, for any judgment, decree, or order of the said Court, nor against any person for any act done by or in virtue of the order of the said Court."

Three meanings may be attributed to this clause.

First. It may mean that no action should lie against one exercising a judicial office, in the country Courts, for any judgment, decree, or order of the Court, whether in a matter in which the Court had a jurisdiction or not, or whether the Judge wilfully and knowingly gave judgment or made an order in a matter out of his jurisdiction or not; so that the fact of the existence of a judgment, decree, or order, should preclude all inquiry.

Secondly. It may mean to protect the Judge only where he gives judgment, or makes an order, in the *bonâ fide* exercise of his office, and under the belief of his having jurisdiction, though he may not have any.

Thirdly. The object may have been to put the Judges of the native Courts on the footing of Judges of the Superior Courts of Record, or Courts having similar jurisdiction to the native Courts

here, protecting them from actions for things done within their jurisdiction, though erroneously or irregularly done, *but leaving them liable for things done wholly without jurisdiction.

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It seems to us, that the first of these constructions is inadmissible. It never could have been intended to give such unlimited power to the Judges of the native Courts, and reason points out that the general words of the clause must be qualified in the manner stated in one of the two latter modes of construction.

We think that the third is the right mode, and that the true meaning of the section in question was to put the Judges of native Courts of Justice on the same footing as those of English Courts of similar jurisdiction. There seems no reason why they should be more or less protected than English Judges of general or limited jurisdiction, under the like circumstances. To give them an exemption from liability, when acting *bonâ fide* in cases in which they had, though mistakenly, acted without jurisdiction, would be to place them on a better footing than English Judges or magistrates, and to leave the injured individual wholly without civil remedy; for English Judges, when they act wholly without jurisdiction, whether they may suppose they had it or not, have no privilege; and the justices of the peace, whether acting as such, or in their judicial character, in cases of summary conviction, have no other than that of having notice of action, a limitation of time for bringing it, a restriction as to venue, the power of tendering amends, and of pleading the general issue, with certain advantages as to costs.

This construction is that contended for by the appellant, and to that extent we think that the appellant is right. But in applying that rule to the facts in *evidence in the present case, we think that enough does not appear to make the defendant a trespasser.

[*76]

We must consider the defendant as being in the same situation as a criminal Judge in this country, with the qualification, that he had no jurisdiction over one particular class, viz., the European-born subjects of the British Crown; and the question is, whether he is liable to an action of trespass, for causing the plaintiff to be arrested, he being, in reality, exempt from his jurisdiction.

If the particular character of the plaintiff be not taken into consideration, and if the case be treated as if he had been a native subject, there is no doubt that the defendant would have been protected; for it is not merely in respect of acts in Court, acts *sedente curiâ*, that an English Judge has an immunity, but in respect of all acts of a judicial nature, as was decided in the case

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of *Taaffe v. Downes*: and an order under the seal of the Foudjarry Court, to bring a native into that Court, to be there dealt with on a criminal charge, is an act of a judicial nature, and whether there was any irregularity or error in it or not, would be dispunishable by ordinary process at law. But the protection would clearly not extend to a judicial act, done wholly without jurisdiction; and it is contended, that this order, with reference to a British-born person, is altogether without jurisdiction, because such person was not answerable to the general jurisdiction of the Court; and the special jurisdiction given by the 53 Geo. III. c. 155, s. 105 (1), did not warrant the mode of proceeding in this case, there being no information or complaint by a native; nor did that section of the statute authorise imprisonment in the first instance.

[*77]

But the answer to the objection to the defendant's *jurisdiction, founded on the European character of the plaintiff, is, that it does not appear distinctly in the evidence, upon which alone we are to act, whatever our suspicions may be, that the defendant knew, or had such information, as that he ought to have known of that fact; and it is well settled that a Judge of a court of record in England, with limited jurisdiction, or a justice of the peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction. Thus in the elaborate judgment of Mr. Baron POWELL, in *Gwynn v. Poole* (2), it is laid down, that a Judge of a court of record in a borough was not responsible, as a trespasser, unless he was cognizant that the cause of action arose out of the jurisdiction, or, at least, that he might have been cognizant, but for his own fault; which last proposition Mr. Baron POWELL illustrates by a reference to the case of the *Marshalsea Court*, which had jurisdiction only in certain cases where the King's servants were parties, who being all enrolled, the Judge ought to have had a copy of the enrolment, and so would have known the character of the parties. It is true, says Mr. Baron POWELL, (speaking of the case of a Borough Court,) that the cause of action does not arise within the jurisdiction of the Court, as it ought to do; but as the Judge cannot know that, except by the plaintiff or defendant, until he knows it, the rule shall be in this case, as in others, "*ignorantia facti excusat.*" Mr. Baron POWELL lays down the same rule as to a party: but his opinion in that

(1) Rep. S. L. R. Act, 1890.

(2) Lutw. App. 1566.

respect is disapproved of by Lord Chief Justice WILLES, in *Moraria v. Sloper* (1), but not so far as it relates to a Judge or officer.

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The like rule has been followed, in the case of magistrates acting under the special powers of Acts of Parliament, who are not liable as trespassers, if they have jurisdiction to inquire into the facts stated before them, and nothing appears on one side or the other to show their want of jurisdiction. *Pike v. Carter* (2), *Lowther v. Earl of Radnor* (3). It is clear, therefore, that a Judge is not liable in trespass for want of jurisdiction, unless he knew, or ought to have known, of the defect; and it lies on the plaintiff, in every such case, to prove that fact.

In the case now under consideration, it does not appear from the evidence in the case, that the defendant was at any time informed of the European character of the plaintiff, or knew it before, or had such information as to make it incumbent on him to ascertain that fact. The point, therefore, which is contended for by the plaintiff, does not arise; and it is unnecessary to determine, whether, if distinct notice had been given by the plaintiff to the defendant, or proof brought forward that the defendant was well acquainted with the fact of his being British-born, the defendant would have been protected in this case, as being in the nature of a Judge of Record, acting irregularly within his general jurisdiction, or liable to an action of trespass, as acting by virtue of a special and limited authority, given by the statute, which was not complied with, and therefore altogether without jurisdiction.

The only doubt their Lordships have had in the consideration of this case is, whether the evidence was sufficient to show that the defendant knew or ought *to have known that the plaintiff was a British-born subject. They have had none, that it was competent for the defendant to give his defence in evidence, under the general issue, by force of the statute 42 Geo. III. c. 85, s. 6, if not at common law (4).

[*79]

(1) Willes, 35.

(2) 3 Bing. 78.

(3) 8 East, 113.

(4) See also the case of *Miller v. Hope*, 2 Shaw. App. Cas. 125, where it was held by the House of Lords (affirming the judgment of the Court of Session in Scotland) that an action of damages is not competent against a

Supreme Judge, for a censure passed by him, while acting in his judicial capacity, on a counsel practising at the Bar, and engaged in the cause then before the Court, although it was alleged that the censure had been made injuriously and from motives of private malice.

IN THE COURT OF COMMON PLEAS IN IRELAND.

1812.
June 12.
Nov. 10, 13, 24.

HENRY EDMUND TAAFFE, Esq. v. THE RIGHT HON.
WILLIAM DOWNES, LORD CHIEF JUSTICE OF THE COURT
OF KING'S BENCH IN IRELAND.

1813.
Jan. 29, 30.

(3 Moore, P. C. 36, n.—72, n.)

Lord
NOBBURY,
Ch. J.,
FLETCHER,
MAYNE,
FOX, JJ.
[36, n.]

Trespass for assault and false imprisonment will not lie against a Judge for acts judicially done by him.

A warrant granted by the CHIEF JUSTICE of the King's Bench in Chambers, returnable in that Court, to arrest a party for a breach of the peace, is such a judicial act as will protect him against an action for false imprisonment.

[*37, n.]

TRESPASS for assault and false imprisonment. Plea 1st. The general issue. 2nd. Not guilty, as to part, and to the residue justification, for that the defendant was Chief Justice of the King's Bench, and as such issued a warrant under his hand, containing certain *recitals, and commanding the persons therein named to apprehend and bring the plaintiff before him (the defendant), or any of the Justices of the King's Bench, to be dealt with according to law. That the plaintiff was arrested under the warrant by a person named in it, brought before the defendant, and by him delivered to bail for his personal appearance in the King's Bench, on the first sitting day of the then next Michaelmas Term, and for his attendance there, from day to day, and from Term to Term, to answer all such matters and things, as should be then and there objected against him, on the part of the King. Joinder on the first plea, and general demurrer to the justification.

Perrin, O'Connell, and Barnes, for the plaintiff,

Who cited 2 Hawkins, Pleas of the Crown, 121 & 135; 6 Comyn's Dig. 101; Pleader E. 4, 15, 17, 379; Co. Litt. 232 a, 303 b; 2 Inst. 52; 1 Black. Com. 350; Lambard's Eirenarcha, 6, 12, 14; 1 Edw. III. c. 16; 34 Edw. III. c. 1; 48 Geo. III. c. 58; 2 Hale, Pleas of the Crown, 78 et 61, pp. 53, 108, 110; 2 Bacon's Abr. 97; *Windham v. Clere* (1); *Hill v. Bateman* (2); *Mostyn v. Fabrigas* (3); *Groenvelt v. Burwell* (4); *Hammond v. Howell* (5); *Dr. Bonham's case* (6); *Floyd v. Barker* (7); *Throgmorton v. Allen* (8); *Olliet and Bessey's case* (9); *Morgan v. Hughes* (10); *Barnardiston v. Scames* (11); *Ashby v. White* (12); *Rex v. Reily* (13).

Foster, Pennefather, and Radcliffe, for the defendant,

Who cited Parl. Roll. 1 Hen. IV.; Viner's Abr. tit. Judicial, tit. Judges 1; *Burdett v. Abbot* (14); *Poole v. Gwynne* (15); *The Marshalsea case* (16); *Bushell's case* (17); *Miller v. Seare* (18); *Sutton v. Johnstone* (19); *Le Caux v. Eden* (20); *Eaton v. Southby* (21); **Anon.* (22); Lamb. Eirenarcha, 12, 13, 579; 2 Hale's P. C.

[*38, n.]

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| (1) Cro. Eliz. 130; 1 Leon. 187. | (13) Irish Term Rep. 204. |
| (2) 1 Strange, 710—711. | (14) 12 R. R. 450 (14 East, 1, 123). |
| (3) Cowper, 161. | (15) Lutw. 935, et 1560. |
| (4) 1 Id. Ray. 454; Comyn, 79, 80; | (16) 10 Co. Rep. 69; Co. 4 Inst. 10 |
| 1 Salk. 396. | Co. 470—471. |
| (5) 1 Mod. 184, and 2 Mod. 218. | (17) 1 Mod. 119; Vaugh. 135. |
| (6) 8 Co. Rep. 107. | (18) 2 W. Bl. 1141. |
| (7) 12 Co. Rep. 23. | (19) 1 R. R. 257 (1 T. R. 493, 511— |
| (8) Tr. 11 Car. B. R. 2 Roll. Abr. 558. | 12, 17, 29). |
| (9) Cited 2 Lutwyche, 1568. | (20) Doug. 594. |
| (10) 2 T. R. 225. | (21) Willes's Repts. 131. |
| (11) 2 Lev. 114. | (22) 6 Mod. 73; 3 Bl. Com. 41; 2 |
| (12) Id. Ray. 938; 1 Sm. L. C. | Inst. 55. |

5, 586; Dalton's Justice, 117; *Pickard v. Paiton* (1); Wilmot's Notes of Opinion, 81, 95, 104; *Pilton v. Durbey* (2); *Smith v. Frazer* (3); *Rex v. White* (4); *Rex v. Burchett* (5); *Rex v. Neals* (6); *Grocers Co. v. Arch. of Canterbury* (7); *Medcalf v. Hodyson* (8); *Rex v. Almon* (9); *Dampport v. Symson* (10); *Ayre v. Sridgwick* (11); *Lidderdale v. Duke of Montrose* (12); *Stone v. Lidderdale* (13); *Flarty v. Odum* (14).

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Mr. Justice FLETCHER, who differed from the other Judges, cited and commented on *Throgmorton v. Allen*; Vin. Abr. tit. Trespass, vol. 20, p. 477; *Floyd v. Barker* (15); *Soames v. Barnardiston* (16); Lamb. Eirenarcha, cap. 9, p. 54—55, cap. 3, p. 12; *Rex v. Almon* (9); Fitzherbert, N. B. 152; Bisp. Nicholson's Eng. Hist., 1 Ed. 1714, p. 205—206; Selden, cap. 9, 1; Bracton, lib. 5, p. 413. Fleta, lib. 2, ch. 12; 2 Inst. 53; 4 Inst. 81, 182, 174—177; Wilmot on Hab. Corp. p. 100; Fitzherbert in 4 Hen. VIII. fo. 16; Fitz. Abr. tit. Assize, 17; Finch, 355; Ratnell, 263; 2 Hale, 194; 48 Geo. III. c. 58; 2 Hawk. 135; *Muriel v. Tracy* (17); *Bengough v. Rossiter* (18); *Bushell's case* (19); *Rex v. White, Burdett v. Abbot* (20); *The Rioters' case* (21); *Bridgman v. Holt* (22).

MR. JUSTICE MAYNE:

Jan. 30.

In this case, however sorry I am to differ from the learned Judge who has preceded me, in pronouncing the judgment of the Court, *upon this important case, yet I am decidedly of opinion, that the demurrer ought to be overruled; and that the plea contains a bar to this action. I feel, that the cause of my differing in opinion from my brother FLETCHER, is owing to his arguing on a question, that is not before the Court. It has been argued mostly at Bar and Bench, as if the question was, whether it was lawful or defensible for a Judge, without any offence committed, or charge made upon oath of crime or suspicion of crime committed, to imprison a subject—*ex mero motu*—out of his mere caprice or malice. Nothing in my apprehension is less like the question before us. The Chief Justice makes no such question. It is not the question here upon the record.

[*39, n.]

The action is for assault and false imprisonment. The plea in effect is, that all that is necessary or proper for the Court to inquire into in this action is, that the defendant is Chief Justice of the King's Bench; and as such, and in the course of his office of Chief Justice, issued a warrant,—legal on the face of it—to cause this plaintiff to do what was necessary for his answering the charge (in the warrant fully recited) of a criminal offence, fully also recited to have been sworn to; and that the only assault and imprisonment was the constable's bringing the plaintiff to give bail, in the course of this proceeding. The plea of the Chief Justice does not say, that it is the right of a Judge to imprison

(1) Siderfin, 276; Noy, 157; 2 Hawkins, 147—148, et 136, lib. 2, sec. 20.

(2) Comb. 57.

(3) 1 W. Bl. 192.

(4) Rep. temp. Ld. Hardwick, 42.

(5) 1 Strange, 567.

(6) Rep. temp. Ld. Hardwick, 112.

(7) 2 W. Bl. 770.

(8) Hutton's Rep. 120.

(9) Wilmot's Notes of Op. and Jud. 243.

(10) Cro. Eliz. 520.

(11) 2 Rolle Rep. 197—198.

(12) 2 R. R. 375 (4 T. R. 248).

(13) 3 R. R. 622 (2 Anst. 533).

(14) 1 R. R. 791 (3 T. R. 681).

(15) 12 Co. Rep. 23.

(16) 2 Lev. 114; 7 State Trials, 437.

(17) 6 Mod. 169, and Vaugh. 137.

(18) 4 T. R. 505.

(19) 1 Mod. 119; 4 Inst. 73.

(20) 12 R. R. 450 (14 East, 1).

(21) 1 Vern. 175; 1 Eq. Ca. Abr. 441.

(22) Show. Pa. Ca. 111.

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without cause; but that it is the right of a Judge not to be called on, in every man's action—upon every exercise of his official authority to become a defendant, before a Court and jury—to show and make out the case, by which it was his duty, as a Judge, to imprison the party charged with crime or misdemeanour. But what is the fact to be put in issue? It is this; the plea of the CHIEF JUSTICE says, "You the plaintiff, being imprisoned under my warrant, have a right to try by your action, in a court of law, whether I am a Judge of the King's Bench; and whether I did more against you, than issue a warrant according to the legal course, upon an alleged criminal charge. If I have done more, you can, on my plea, prove it. If I made a warrant the fraudulent cover for oppression, or corruption, or malice, you can, on my plea, aver that. If I have done anything *against you, not in the course of my office, you can say so. If the charge recited in my warrant is no legal charge of an offence, your demurrer will serve you. But I deny your right to try before this Court and a jury, in this action, the grounds of my judicial acts, or the rectitude or legality of my judgment." The plaintiff, not content with this answer, demurs: and thereby contends, that the Chief Justice is by law bound, here in this action to come to trial, not only of the matter of fact which he offers for trial, but of all the facts, grounds, detail of proceedings, and circumstances of offence, charged against the plaintiff, and also, that he must discuss, and bring to decision before this Court, or the Judge at Nisi Prius, the rectitude and reasons of his acts and judgment. The plea brings the case to the same question, as if the plaintiff had declared, that the Chief Justice, acting as a Judge of the King's Bench, issued his warrant in the regular way, with recital of informations before him on oath, of a crime committed by the plaintiff; and that he held him to bail, to answer against that charge, in the proper Court. The Chief Justice has done no more than bring on the record what the plaintiff omitted of these truths. If the plaintiff had so declared, the Chief Justice, I presume, would have demurred, and I would be of opinion that such demurrer ought to be allowed. It is now the same question, viz., does the imprisonment now appear to this Court to have been a judicial act? If it does, the plea, standing admitted, is a bar.

A second question, scarcely attempted to be made at the Bar, will not require much argument, and little more than an observation, namely, whether an action lies against a Judge, for his judgment or judicial acts.

A third question, rather mentioned than argued, was on the distinction between judicial acts, in Court, and out of Court.

[*41, n.]

And first, as to the question whether an action lies against a Judge, for his judicial acts. The Chief Justice is by the common law a depository of the King's authority, for the purpose of administering justice to the nation—he acts upon oath, and upon high confidence; and immediately with his Court represents the King in *that sacred and important duty. The King does justice through his Judges—they are his delegates; and they are accountable to him alone, for the pure and honest performance of their trust; and they and the King are, towards the people in dispensing the law, as it were, one individual authority. There must be some place and part in the stage of proceedings—some point in the administration of the law, where unqualified confidence is to be reposed and acknowledged; and in the declaring of justice to the nation, that place rests with the King's Judges.

The difference between the Judges of the superior and inferior Courts has not been sufficiently attended to. The King's Judges stand next to, or with the King, or for him, appointed by him, and responsible to him; and he will have his justice done by them, and by them alone. The inferior Judges stand under, and represent the authority of subjects; they have only the responsible power of subjects entrusted to them; or they are placed at a distance in responsibility from the King, and are subject to the control and direction of the superior

Courts. An action before one Judge for what is done by another, is in the nature of an appeal; and is the appeal from an equal to an equal. It is a solecism in the law, I say, that the plaintiff's case is against the independence of the Judges. The principle contended for would annihilate that independence. Judges are to be equally independent of the Crown, and of the people. If there must be parties in the nation, and one is inclined to degrade Judges and intimidate them into subjection to their views, it may also happen, that another party may be so inclined the next day; the partisans of a King may wish to reduce them to servility—the partisans of anarchy or revolution, to render them their instruments of a worse despotism, or intimidate them from the performance of their duty, and from restraining the first and insidious efforts towards confusion and rebellion. The honest, good, and constitutional mind will always wish to find them entirely free and unbiassed; and will rather entrust them with a high and unquestionable authority, and if guilty, leave their punishment to Parliament alone, than hazard their fortitude and independence by the alarm, and question, pains and *expense of as many actions as there may be acts of duty encountering the bad passions and prejudices of mankind. The constitutional idea of a Judge is "dignity," for the sake of the King and people. There was one case in England, where an attempt somewhat similar to this was made; an action against the Judges at the Sessions in London; and there it was soon decided that no such action lay. Liability to every man's action, for every judicial act a Judge is called upon to do, is the degradation of the Judge; and cannot be the object of any true patriot or honest subject. It is to render the Judges slaves in every Court that holds plea, to every sheriff, juror, attorney, and plaintiff. If you once break down the barrier of their dignity, and subject them to an action, you let in upon the judicial authority a wide, wasting, and harassing persecution, and establish its weakness in a degrading responsibility.

As to the authorities upon the subject, no such action was ever sustained; and save that of *Hamond v. Howell* (1), so often mentioned, none ever was attempted, but once before, and that in Ireland, where also it was thought of to bring an action against the chief Governor of the country. But, as in the case of the King's Judges, so in that of his representative the Lord Lieutenant of Ireland, the constitutional remedy, if there were misconduct, is before the King and the Parliament. The case attempted in London was the strongest imaginable. The Recorder of London was the Judge: his act was expressly declared illegal by the Court of Common Pleas, upon discussing the case on a *habeas corpus* (2). Upon that opinion of the Court, an action afterwards was brought against him in the King's Bench, before Lord Chief Justice Hale, and his brothers; and what were HALE's expressions? "That the action would not lie. That in the case of an erroneous judgment, though a writ would make void the judgment, it doth not make the awarding the process void to that purpose; and the matter was done in a court of justice; and that they would have but a cold business of it," 1 Mod. 119, and afterwards in 2 Mod. 218, the *same case came on; and Howell having pleaded the special matter, the plaintiff replied, *de injuriâ sua propriâ*; and to this the defendant demurred; and what was the opinion of the whole Court? "That the bringing the action was a greater offence than the fining of the plaintiff, and committing him for non-payment; and that it was a bold attempt, both against the Government and justice in general. It was an error in judgment, for which no action will lie."

There is no other reported authority, for there was no other case of such an action attempted; but there is plenty of solemn authority, on the law and principles of such an action. Besides Sir Eardly Wilmot and Lord Coke, the authorities of both of whom have been questioned, Rolle, Hale, Hawkins, Blackstone, De Grey, and whoever else at the Bar or Bench have been referred

(1) 1 Mod. 84, and 2 Mod. 218.

(2) Vaughan, 135.

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to on the subject, are decidedly against the monstrous doctrine contended for by the plaintiff. We find in *Floyd v. Barker* (1), "Jurors not to be drawn in question, nor Judges. No proof to be admitted against the presumption, that they, as sworn, will do justice. They are guardians of the King's oath, and are to answer to him alone; for otherwise it would tend to the scandal and subversion of all justice; and those who are the most sincere would not be free from continual calumniation. For *Multe incidit sunt bonis*." In *Miller v. Seure* (2), DE GREY, Chief Justice, said, "it is agreed the Judges in the King's superior Courts of Justice are not liable to answer personally for their errors in judgment; and this, not so much for the sake of the Judges, as of the suitors themselves. The protection, in regard to the superior Courts, is absolute and universal; with respect to the inferior, it is only while they act within their jurisdiction;" and, again, we find the following passage in 3 Bl. Com. 41—"Bracton expresses the power and dignity of the King's Bench, when he says, that the Justices of this Court are *Capitales, generales, perpetui, et majores, a latere regis residentes, qui omnium aliorum corrigere tenentur injurias et errores*."

[*44, n.]

And with those ancient and high authorities in our law, is perfectly consistent what is said by Wilmut, 104, in answer to the question by the Lords, whether if a Judge, before the statute of *Charles, had refused to grant the *habeas corpus*, the subject had any remedy at law, by action or otherwise, against the Judge, "I think," says he, "that the subject had no remedy at law, by action or otherwise, against the Judge, for such refusal. The denying a writ, stands upon the same ground as any other breach of duty." And in page 259 he illustrates his doctrine thus: "The constitution has provided very apt and proper remedies, for correcting and rectifying the involuntary mistakes of Judges; and for punishing and removing them for any voluntary perversions of justice." It is also laid down in an ancient case, in 1 Rolle's Abr. 92: "No man shall have an action on the case against a Judge of Record, for giving a false judgment." Again, we have the opinion of an eminent writer on criminal law, and of comparatively modern authority. Serjeant Hawkins thus expresses himself in Co. Pl. 147: "This statute (Habeas Corpus Act) makes the Judges liable to an action at the suit of the party grieved, in one case only, which is, the refusing to award a *habeas corpus* in Vacation time; and seems to leave it to their discretion, in all other cases, to pursue its directions in the same manner as they ought to execute all other laws, without making them subject to the actions of the party; and this seems most agreeable to the general reason of the law, which regularly will not suffer a Judge to be liable to an action for what he does as Judge." And observe, here he was speaking of acts done by Judges out of Court. Again, in the same book, page 136: "No man is liable to an action for what he doth as Judge."

[*45, n.]

What says my Lord Chief Justice HALE, in *Howell's* case? "I speak my mind plainly, that an action will not lie. In case of erroneous judgment given by a Judge, shall the party have an action of false imprisonment against the Judge? No; nor against the officer neither—the matter was done in a court of justice:" and again, in the same case (3), the whole Court treats the action as criminal, and said, "that the bringing the action was a greater offence than fining the plaintiff; and that it was a bold attempt against the Government and justice in general." See how *such an action was considered by the Bench and the Bar, in the celebrated modern case of *Burdett v. Abbot*, the Speaker of the House of Commons, in 14 East, 123; Justice BAYLEY asks the counsel this question, "Would an action lie in the Court of Common Pleas against the Judges of this Court, or any of them who signed a warrant of commitment;" and how is it answered by Burdett's counsel, *Mr. Holroyd*? "Certainly no action would lie against Judges—they are accountable in another way—no ordinary proceedings in the common way can go against them;

(1) 12 Co. Rep. 23.

(2) 2 W. Bl. 1141.

(3) 2 Mod. 218.

but, with submission, if they issued a warrant of commitment, in a matter of which they had no jurisdiction at all, and that it so appeared on the face of the warrant, an action would there lie against the officer who arrested or imprisoned the party upon such warrant." We find also legislative opinions upon this point appearing in the statutes empowering magistrates to plead the general issue, giving in such cases notices to magistrates, limitations of actions, costs, &c. If this action lies here, so it would in any of the most inferior Courts in the kingdom. The law draws no distinction. It is admitted, that no action lies against a witness for what he deposes in a court of justice, because he must be freed and unfettered in giving his evidence, and he is brought there in the course of law, and by the summons of the King.

As to the question, whether the warrant here was a judicial act, the ground of argument arose from a confusion of ideas; because it is stated, that certain other persons, besides Judges, have power to do the like act in certain cases—if it did not occur that another, who is not a Judge of King's Bench, issues such warrants, it would not probably be argued, that when a Judge of King's Bench issues one, it is not a judicial act. Here is an act done by one who is a Judge—done in a matter within his jurisdiction, as a Judge; and *bonâ fide* intending to act therein, as a Judge. How, then, can it be imagined, that it is not a Judge's act? Why, forsooth, say the counsel for the plaintiff, the Chief Justice is a justice of peace, or a conservator and a Chief Justice distinct; and we tell you, he must have done such an outrageous act as this, in his second person and in his inferior character as a conservator, and not as a Chief Justice. If it could be thought of, as a serious question—as a good ground of defence, the plaintiff would have replied so, and not demurred; for by so doing, it is admitted, that if there is no legal impossibility of the act being done as Judge, it was done as Judge, and in no other character.

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[*46, n.]

But it is said, that the Act 48 Geo. III. c. 58, is the only authority by which a Judge of the King's Bench can issue any warrant for a misdemeanor, before indictment; and it is truly said, that this warrant is not under that statute, and is therefore void, or is nothing more than the warrant of a justice of peace, in the person of the Chief Justice. But read the statute; and I ask, does it declare, or even imply, anything against the Judge's power, which he has practised universally, time out of mind; and which power is recognised by the authority of Hawkins and Dalton? Is not the statute made expressly to extend the kind of proceedings before given in revenue cases, and to give warrants marked for bail in specific sums; and to give plea and appearance by default? Indeed, if this warrant is void, as a Judge's warrant, I don't see how the justice of peace got the power to issue it, or the conservator, mentioned by my brother FLETCHER.

A Judge of King's Bench is as much a justice of peace, as he is a constable or coroner. He has in him the power of all these; but he is not thereby the less a Judge—justices of peace are ministerial often—Judges of King's Bench never. It is said, that they are ministerial to the King—why? On the contrary they have his whole legal power, in matters touching the administration of justice: and he cannot act but by them—see the ludicrous consequences of treating them as ministerial, or subjecting them to action. They become amenable to every other species of correction by a Court, attachment, &c. One hour at the Bar—the next at the Bench, of the same or some other Court. They would have a busy and harassing time, getting from one station to the other—from the Judge to the accused—from the corrector to the corrected.

As to another topic relied on in the course of the argument, I must differ from those who have preceded me; for I consider one Judge's act to be the act of all the Court; and my brother must be under some lapse in that respect, in arguing on the contrary principle; for in my mind, a Judge in his Chamber does no act, which the Court may not also. Even his bailing, is not like a

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justice of the peace's bailing; but according to his discretion, and he has that power in all cases whatsoever (1); nor was he ever thought to be affected by any of the multitude of statutes, on which the power and authority of the justice of peace depends—his power is by the common law. How does the warrant of the Court differ from the warrant of the Judge? Not in the least. Consider the nature of side Bar rules, and other acts of the same kind—fiats—taking bail—refusing it—granting *habeas corpus*—refusing it—discharging on it—remanding on it, &c. Would an action lie for every one, or for any one of these acts? What distinction is there between these and the most solemn acts of the Court, in respect of the protection of the Judge? And what difference between them and this warrant? None! It is only a confusion of ideas; because it is a thing, which in certain cases can be done by others who are liable to the *examen* of the Courts, by action, which Judges are not—and this doctrine and reasoning is amply sustained by the several cases cited and commented on at the Bar, namely, Ca. temp. Hardw. 42, *Rex v. White*. The arguments of the Judges in *Rex v. Wilkes* (2), and also by the case of *Goldschmidt v. Marryat* (3), and Wilmot, in the case of *Rex v. Almon*, p. 268, says, "I can make no difference between a Judge acting in a Court, or judicially out of Court, (speaking as to the protection, privilege, and dignity of a Judge in a case of libel,) he acts by virtue of the patent appointing him a Judge, and of the power which the law gives him in that character and capacity. When he issues his warrant, as conservator of the peace, the Court punishes the officer who disobeys it, by attachment. Why? Because it is the act of a Judge, in his judicial capacity. (Thus confirming the case of *Rex v. White*.) Suppose he was calumniated for issuing such a warrant, would not the Court grant an attachment?" And in p. 254, he again says, "the acts *done in Court and out of Court, taken together, form that system of practice, by which the benefit of the law is dealt out to the people." And in p. 100, "Judges issue warrants of their own proper authority, separate from the Court, and out of Term." Almost the same words are used by the three Judges in *Wilkes*' case (4), "A great deal that may be done in Court is done by Judges at Chambers, in Term time; in Vacation a great deal more is done by them in Chambers; because it can be done no where else." This Judge, Sir E. Wilmot, has been on the present occasion, I believe for the first time, assailed in his character for knowledge and integrity; yet, in the parts only of his judgment, in *Rex v. Almon*, which press on this case, he has other support than my opinion of him—so has the Court in which he sat; and the able reporter of their enlightened and unanimous decisions. With respect to the Book of his opinions, upon which so much has been said—what is its extrinsic merit? What its authority? Does it not prove itself? Has it not as good a claim to respect; and ought it not to carry as much weight with the law world, as other great men's commentaries? At least, how did the Court and Bar receive it, in *Burdett v. Abbot*, when Sir V. GIBBS cited the Judge's argument in *Almon*'s case, and called it his "admirable argument."

So far, I think, upon principle and authority, there can be no question of the protection of the Judge, for acts done out of Court, as well as done upon the Bench; and now, as to the act in question being one, which he might do out of Court, see 2 Hale, Pl. C. 5, 6. "Any of the Justices of the King's Bench may issue out their warrants for apprehending of a malefactor, or for surety of the peace in any county;" and p. 105, as to the power of the King's Bench in cases of breaches of the peace, and before indictment. "The Court of King's Bench has not only a power to issue writs, upon indictments or appeals before them, but has also power by order, to command the sheriff of the county where they sit,

(1) 2 Inst. 189.

(2) 4 Burr. 2527.

(3) 1 Camp. 562.

(4) 4 Burr. 2569.

or the marshal of the Court, to apprehend felons or disturbers of the peace, and bring them before the Court."

With respect to the plea which is here put upon the record, in bar to the present action, I think there ought not to be a second opinion, as to the necessity and propriety of putting it in by the Lord Chief Justice of the King's Bench. I can easily believe with *Mr. Radcliffe*, that the Chief Justice wished the decision to be on the abstract question, whether he ought to give other answer to the action, than he has done by this plea. I think that those who surmised, that this plea was prepared against his approbation, as if it was unfit for his candid and honourable justification, took away from him a merit to which he is entitled, and which is a further proof of his just conception of the judicial character, of his constitutional spirit, and of his fortitude and personal disinterestedness. I have a perfect recollection of the learned and respectable defendant stating to the Judges (when taking their opinion whether he should sit on the trials of *Kirwan* and others) that he was resolved to take no steps in this action, nor put in any plea that should compromise the constitutional rights of the Judges, or desert that dignified and constitutional defence which a Judge ought to make. It happened, that my brothers, *FOX* and *FLETCHER*, were not present at the time, and it may be a fact with which they are unacquainted; but I thought it infinitely to the honour of the Chief Justice of the King's Bench, to display a temperate, but fixed resolution to sustain the legal rights and privileges of the judgment seat, of which he was the trustee.

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MR. JUSTICE FOX :

Two of my brethren having given their opinions upon this record, at considerable length, it will not be necessary for me to occupy much of the public time. My brother *FLETCHER*, in giving his judgment, differed from the opinion pronounced by my brother *MAYNE*, who has just closed his judgment and his argument.

It now, of course, devolves on me to state my opinion, and such reasons as have decided my mind in forming that opinion—not so much at large as either of my brethren have done, for indeed they have, in their respective views which they have taken of the case, stated the principles of law and the authorities, together with the reasons and grounds of their opinion as applicable to the present case, so fully, that in following either of them, I would do injustice to the ability with which they have argued the question.

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The questions which arise upon this record, appear to be two; the latter branching out into different modifications as appeared in the course of the argument. The first question which I deem myself bound to decide, is, whether the arrest, as it is stated by the defendant, is legal or not. The second question is, supposing that the arrest, as it is stated upon the record, is not legal, whether the plaintiff is barred of his action, by the matter stated by the defendant in his plea. I feel myself bound to consider, and decide the first question; because, if I should be of opinion that the plea discloses sufficient matter of justification to show the arrest legal, then the second question could not arise.

It is my opinion, that the matter stated by the plaintiff does not justify the arrest; and that the arrest was not lawful in the manner in which it has been pleaded. It is necessary to keep the consideration of these two points separate and distinct, and not to let the subject-matter of one question influence the discussion of the other; indeed, I apprehend that some little difficulty, perhaps I might say confusion, has arisen from drawing an inference too hastily, that the decision of the first question was to close and decide the second question, which possibly was the only one intended by the defendant to have been proposed to the Court, as the other has not been much relied upon at the Bar.

The plea states the letters patent appointing the defendant Chief Justice, that being Chief Justice, and by virtue thereof, and as such he made a warrant,

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reciting in the warrant that a certain information upon oath had been made before him, and that by virtue of this warrant the arrest was made. It is a principle in law, that the liberty of any subject of this realm is not to be restrained by any magistrate whatsoever, unless by presentment or due process of law. In this case the arrest is stated to have been made solely as an arrest to bring the party before a Judge of the Court of King's Bench; and the warrant under which arrest is made, is stated in the usual course of such warrants. No principle of authority in the magistrate is *referred to,—nothing more is relied upon by this plea to justify the arrest, save barely a recital in the warrant, that an information was sworn before the defendant, charging the plaintiff with a certain offence. I think that the defendant issuing a warrant of arrest, ought, in order to justify such arrest, to set out and aver in his plea, the informations previously sworn. It would be, in my opinion, carrying the case beyond the bounds of the law, and be dangerous to the liberty of the subject, to say that the Chief Justice, or any other Judge of the King's Bench, or any magistrate, has, in himself, an authority of arresting by warrant, any subject of the realm, upon a bare suggestion in the warrant, that the party did a particular criminal act. In order to constitute the arrest a legal one, the criminal act must be duly evidenced to him by information upon oath. I am perfectly aware, that the highly respectable and much revered defendant in this case, was in fact authorized to issue his warrant, by a regular information duly taken and sworn before him. But it is not so avowed by this plea. The authorities which have been resorted to on this part of the case, if authorities are here necessary, are 4 Bl. Com. 125; 2 Hale, P. C. 108, 110, and 2 Hawk. 135. In giving this opinion on the first point in the case, I must be understood as not imputing in any way the slightest irregularity to the defendant in this case. The point is made by the mode of pleading, and does not in any manner arise from any act of his.

I now proceed to the second question in this case; namely, whether on the whole matter disclosed by the defendant's plea, the plaintiff can have or maintain his action against him. It has been relied upon, that the defendant has alleged, as Chief Justice, sufficient matter to show, that he acted in a judicial capacity, and is not answerable in this action, or indeed in any action, for what was done by him as a Judge, in a court of justice.

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The principle at law, of exemption from being sued for matters done by Judges in their judicial capacity, is of great importance. It is necessary to the free and impartial administration of justice, that the persons administering it should be uninfluenced by fear and unbiassed by hope. Judges have not been invested with this privilege *for their own protection merely; it is calculated for the benefit of the people, by ensuring to them a calm, steady, and impartial administration of justice; it is a principle coeval with the law of the land, and the dispensation of justice in this country; and is founded on the very frame of the constitution; it is to be met with in the earliest books of law; and has been continued down to the present time, without one authority or *dictum* to the contrary, that I have been enabled to find. My brother MAYNE, who preceded me, has given a clear and lucid detail of the authorities, as they have arisen from time to time. Most of them were mentioned in the course of the argument at the Bar. After the manner in which they have been stated by him, it becomes superfluous now for me to travel minutely through them again; but I think myself called upon, in assertion of this principle, so vitally necessary to the administration of justice, to maintain it in such a manner, as may be requisite to give it full effect and operation; still, however, not trenching in any manner on the rights of the subject, which this principle is intended to protect; not to injure or infringe. It appears to be most necessary that a Judge administering justice shall not be liable to answer for acts done judicially by him, by the way of action or prosecution; they are only answerable for their judicial conduct in

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the high Court of Parliament; and without the existence of this principle, it is utterly impossible that there could be such a dispensation of justice, as would have the effect of protecting the lives or property of the subject. A Judge must—a Judge ought to be uninfluenced by any personal consideration whatsoever operating upon his mind, when he is hearing a discussion concerning the rights of contending parties; otherwise, instead of hearing them abstractedly, a considerable portion of his attention must be devolved to himself. There is something so monstrous in the contrary doctrine, that it would poison the very source of justice, and introduce a system of servility, utterly inconsistent with the constitutional independence of the Judges,—an independence which it has been the work of ages to establish, and would be utterly inconsistent with the preservation of the rights and liberties of the subject.

The leading case on which this principle has been stated particularly and at large, has been already amply dilated upon; I mean the case of *Floyd v. Barker* (1), in which the principle was extended to magistrates. The reasons for extending it so far, are stated with such accuracy, that no case has occurred since that time, which has not bottomed itself on that adjudication. Indeed, it has not been controverted that for any act done by a Judge sitting in Court, he is not responsible in an action to the party conceiving himself aggrieved. But this is not the extent of that case. It embraces not only judicial acts done by a Judge sitting in Court, but also acts done by him out of Court. After mentioning that for acts done openly in Court, the Judge is not responsible, it proceeds, “nor for acts done out of Court, such as the due examination of causes out of Court, and inquiring by testimony and other such things; because they are fit to be done by the Judges.” Here expressly extending the principle of protection, beyond the limits of acts done in Court, to acts done out of Court, giving examples of each. The present case comes within the authority of this leading case; it is within the principle of that protection, which the Judges are clothed with, for acts done by them as such. The case goes on, lest there should be any mistake, to show what acts are not within this protection, “as if a Judge hath conspired before, out of Court, this is extra-judicial; subornation of witnesses, and false and malicious prosecutions, out of Court, to such whom he knows will be indictors, to find any guilty, &c., will be an unlawful conspiracy.” These are not judicial acts—they are not within the protection of the principle; and the person who commits them, even though he be a Judge, is left open to an action; because he has done that which was not fit for him to do—which did not appertain to a judicial character, “these are extra-judicial”—making the distinction between judicial and extra-judicial acts, not, as in argument here has been contended, that judicial acts are such only as are done in Court, if they are necessary to the administration of justice.

Let us see, then, whether the act disclosed in this case by the defendant's plea be such an act as falls within the reason and *authority of this case. The act stated by the defendant is, the issuing of a warrant, as Chief Justice, reciting an information upon oath to have been sworn before him. The warrant is full—regular on the face of it;—it recites an information to have been taken upon oath, in order to show that he was acting in a judicial course of proceeding. This recital is important: though it is not sufficient to bar the plaintiff as matter of justification. With the view of bringing the case within the principle I have mentioned, it is not necessary to make the averment, that an information was sworn, to ground the warrant, if the act was done in a course of judicial proceeding; because it cannot be traversed. It is immaterial to decide whether or not any error was committed by the Judge, because if he acts judicially, even though he is in error, he is protected. It is absurd to say that the protection is confined to those cases where no protection is required. To say

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that everything is necessary to protect a Judge from an action, that would be necessary to protect an ordinary magistrate, is unreasonable; when the very object of the protection is, not to say that he is justified, as having acted legally, but that he did the act in the ordinary course of justice; and for such an act is not responsible in an action at law.

Much reliance has been placed, on the part of the plaintiff, on the analogy between the act of a Judge of the King's Bench, and that of an ordinary justice of the peace; this argument deserves consideration. A Judge of the King's Bench has a jurisdiction over all matters of crime within the realm. They are superior Judges in criminal matters. They are so by virtue of their patents and their offices. This power and jurisdiction is incident to their office, to have a power of issuing a warrant commensurate with this jurisdiction, to bring in the party for inquiry and trial. It would be vain and idle to say, that the Judges of this high Court have by virtue of their offices jurisdiction over criminal matters, generally, throughout the realm; unless it was, at the same time held, that they had necessarily inherent in their office, and flowing directly from it, a power of issuing process to bring in the party charged with crime; without this their jurisdiction would be impotent,—could never be *brought into action at all. All the ancient authorities speak of this power of issuing process as necessarily incident to their office, they are conservators of the peace *virtute officii*. The distinction is recognized by Blackstone, in his 1 Com. 368, between conservators of the peace *virtute officii*, and conservators by prescription. The Judges of the King's Bench are stated to be conservators of the peace *virtute officii*. The Master of the Rolls and others are conservators by prescription; that is, the Judges of the King's Bench have this power, as incident to their jurisdiction, and from their patents, which constitute them supreme Judges in criminal matters, throughout the realm. It would be strange to say, that a process, which is necessary to give animation to their jurisdiction—to give it operation and effect, to enable it to act at all, and flowing from their very office,—I mean the issuing a warrant to arrest for crime, should not, in itself, be a judicial act. There is, as I conceive, a wide distinction in this respect between a Judge of the Court of King's Bench, and an ordinary justice of the peace. Justices of the peace are not, individually, invested with a power to hear and determine any felony, or other offence. Their authority is to try before themselves and others. No individual justice of the peace has that power; but, as an individual, he has merely a ministerial power; to bring the party accused before others as well as himself, for the purpose of trial. This distinction has been noticed by Serjeant Hawkins and by my brother FLETCHER. The distinction is this; where process is issued, to bring the party accused before the person issuing the warrant, and others, for trial, it is a ministerial act—it is ministerial to the other justices, who are necessarily to sit with the justice issuing the warrant. But in the case of a Judge of the King's Bench, he has power and authority to sit alone, and try the fact, respecting which the process issued. A single Judge is invested with full power to try the criminal in the same manner, as if assisted by all the Judges in full Court. He is not ministerial to others; but has this power, as incident to his office. But this distinction is further strengthened, when we come to consider the power of justices of the peace, as regulated by different statutes. *Justices of the peace were originally conservators of the peace merely, under the 34 Edw. I. Justices of the peace were first appointed by commission from the Crown, by which the justice so commissioned, and others of whom particular persons named were to be always present, were authorized to try felons. See how that power has been abridged by subsequent statutes. The statute 1 & 2 of Phil. & M. c. 13(1), in England, of which the statute of the 10 Charles I.

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c. (1) in Ireland is a transcript, obliges justices of the peace to take examinations of all persons brought before them under charge of felony, and other offences therein specified; they are to certify the examinations, and to take bail for the appearance of the party, at the next Assizes or Gaol Delivery; thereby depriving the justices of all jurisdiction whatsoever, which had been given by their commission, in cases of felony; or at least suspending the exercise of that jurisdiction; for the statute is mandatory upon them, to transmit to the Judges of Assize, the informations, examinations, and recognizances taken before them; and a power is given to the Judges of Oyer and Terminer and Gaol Delivery, if a justice of the peace does not comply with the statute, to fine him, in their discretion, for such default. Here by this statute, the justices of the peace, in the cases therein mentioned, are clearly ministerial. Their duty is confined solely to the office of taking informations, examining the prisoner, and returning those informations and examinations to another jurisdiction for trial of the parties, under the coercion of being fined, in case of neglect. It would be strange to say, that in these respects, the justice of the peace was acting judicially—he is not only ministerial in all these particulars, but he is ministerial to the Judges of Assize and Gaol Delivery, under the responsibility of being fined, in case he does not comply. Where then is the analogy between the process of arrest issued by a justice of peace, and a Judge of the King's Bench? The justice of the peace is by law limited in his jurisdiction, having no jurisdiction singly and alone over the matter, for which his warrant might issue. No trial had by him alone, *could be sustained in law; he must have the co-operation of others, specially named for the purpose. It was not an authority flowing out of his office, but appears to have been at all times, as well before the statutes were passed for regulating the office of justice of peace, as since, purely ministerial. This analogy, therefore, which has been relied upon as complete and decisive, with regard to the jurisdiction of a Judge of the King's Bench, appears to me not to apply. A justice of the peace has no authority to try, by himself, any criminal offence; a Judge of the King's Bench has, by virtue of his office, a power to try all criminal offences, arising within the realm. He is not restrained as to the number of persons who are to sit in judgment upon the offender; the trial may be by a single Judge; and the power of issuing a process to arrest is commensurate with his jurisdiction; it arises from his very office; and is not ministerial to any other person whatever. The analogy thus completely fails in all its parts.

But it is said, and it deserves notice, that this act does not appear to have been done in a judicial course; because it wants the necessary concomitant of an information upon oath, to ground the warrant upon. I have already endeavoured to show, that this is, in fact, confounding matters altogether distinct. It is saying, that the principle of protection should extend only to cases where it is not necessary—where the jurisdiction is acknowledged, and indemnity complete, without the aid of that principle. It is against the authority of all the cases and the principle itself, which is to protect Judges, where they have erred; and yet, to show that it comes within such a principle, it is contended you must show that no error at all exists. The case of *Hamond v. Howell*, in 2 Mod. 218, which was stated by my brother MAYNE very much at large, and with great precision and clearness, was bottomed upon this, that the Judge acted erroneously. The point, as to the illegality of it was decided by all the Judges. *Bushell's* case was originally before the Common Pleas, and afterwards before all the Judges. They all concurred in opinion, *that the act done by the Judge was an illegal act; yet they all agreed, as the act was done in a course of justice, the Judge was not answerable for it in an action at the suit of the party.

Whatever doubts or difficulties may have occurred to my mind in the progress of the argument, I have none now. I am clearly and decidedly of opinion, that

(1) *Sic*.

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[*58, n.]

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the demurrer in this case ought to be overruled; that the matter disclosed by the defendant in the second plea is sufficient to show that the act done by him was done in a course of justice; that it was a judicial act, flowing from his commission. The law on the matter now referred to us has received the sanction of many successive Judges, venerable from their experience, their knowledge, and integrity; their decisions have not been questioned. There is not to be found an adjudged case nor a *dictum* varying therefrom; neither can any reasonable analogy be argued upon, at all trenching upon this principle. I do not think it necessary to follow my much respected and highly talented brother FLETCHER, through that very able argument which he has delivered with such eloquence and ability. It does not appear to me, that the arguments adduced by him apply to the proposition which has been contended for on the second point, though they apply to the first point arising on this record; namely, that the arrest was not legal. In that I concur with my brother FLETCHER: but I differ widely from him on the conclusion which he has drawn; that therefore, or for any other reason, this action is maintainable. Here again I must repeat, that there is not either principle, authority, reason or analogy to warrant such conclusion. If we were to pronounce the defendant liable to this action, we would decide contrary to the entire current of authorities; we would unsettle the law; we would expose the Judges to be harassed in their persons,—to have their minds disturbed, and their station degraded, for acts done in discharge of their judicial duties. I feel myself therefore bound to pronounce, that in this case I am most clear, that the demurrer here taken by the plaintiff ought to be overruled.

LORD NORBURY:

[*59, n.]

After the long, elaborate, and able discussion which this case has *undergone, during the course of the former and part of the present year, were it not for the singularity as well as the importance of it, I might content myself by merely expressing my assent to the very satisfactory judgment pronounced by my brothers FOX and MAYNE for the defendant; but I owe it as a matter of respect to the Bar, as well as in point of duty to the public, to assign my reasons for concurring in that judgment.

The whole of this case is spread on the pleadings. The declaration is trespass *vi et armis*, against the defendant, who is therein designated and styled Chief Justice of the King's Bench, who is attached to answer the plaintiff in the Common Pleas, for an assault and false imprisonment without any probable cause.

There is a further count, for beating and ill-treating the plaintiff, in the usual language of complaint against unjustifiable force.

To this declaration the defendant has pleaded, amongst other matters, as his second plea in justification, that which is the subject of the present argument.

By the plea in question, the defendant sets forth, "that he is Chief Justice of the King's Bench;" sets out the King's patent, by which he holds his office by the Royal authority; "and that as such Chief Justice he issued his warrant to certain persons therein named, under his hand and seal, reciting, that it appeared to him, by information on oath, that on the 9th of July last, a number of persons assembled in Fishamble Street, Dublin, and resolved to form a committee, to represent the Roman Catholics of Ireland, for the purpose or under the pretence of preparing a petition to Parliament; and that the plaintiff, amongst others, met and acted in the appointment of such representatives, against the statute; and that defendant issued his warrant to apprehend the plaintiff, and bring him before him or some other Judge of the King's Bench, to be dealt with according to law. In obedience to such warrant, the constable did arrest and apprehend the plaintiff, and brought him in custody; and the defendant did forthwith deliver the plaintiff to bail for his appearance in the King's Bench, on the first sitting day of the then next Term."

To this plea the plaintiff demurs, as insufficient in law by way of justification, on the following grounds.

1st. That the plea avers no positive offence. 2ndly. That there is no averment of an information on oath, to ground the warrant. 3rdly. That no offence having been charged, plaintiff could not have been legally arrested, before indictment found. 4thly. That the act of the defendant cannot be considered as a judicial act, but merely as ministerial or extra-judicial; and that for such ministerial or extra-judicial act the Chief Justice is liable to an action, and responsible in damages to the party complaining.

It must be allowed, that if the act in question, as complained of, can be legally considered as imputable to the defendant, in a capacity and character distinct from his judicial functions and privileges with which his office is clothed, the question would be conclusively against the plea. But it stands admitted by the demurrer, that the defendant acted in the matter as a Judge; and it has been given up in argument, that in order to support the plaintiff's positions, the act must appear to be merely ministerial, as contra-distinguished from judicial; as it is conceded that for an act purely judicial, the action cannot be maintained against a Judge. In the progress of this discussion, no definition has been given or legal boundary established, by which the act in question is proved to be excluded, or put out of the sphere of that class of official duties, properly called judicial, as distinguished from ministerial. If it be once established, that the act in question emanated from, and was appropriate to, the legal duties of the office of Chief Justice, it must, on this argument, stand as an act purely judicial, and as such it must be exempted by the law from responsibility to the party by action. Much argument has been expended in attempting to confine judicial acts to such only as are done in open Court. But it has been demonstrated, that whether such acts as that in question be done by the Judge in Chamber, or *sedente curia*, the privileges connected with the duties of the Judge's situation, and which are given for the public safety and advantage, in which the security and independence of the Judge are interwoven, must necessarily await upon such acts, as if they are judicial. The position *which I lay down is supported by obvious principles, and the established authority of *Floyd v. Barker* (1), which has been uniformly recognized. Upon the face of the pleadings it appears, that the act of the defendant which is complained of, is the judicially issuing a legal process, to compel an appearance in a matter within the jurisdiction of the Judge, and relating to the Court of which he is the Chief Justice.

It further appears by the plea, and it stands an admitted fact, that the plaintiff who complains here, has been apprehended by the warrant of the defendant, but been held to bail to appear in the King's Bench, where the cause of the committal, and the investigation of the offence thereby imputed, are vested and attached, and are put in the usual course of legal investigation, as matter which is incident and peculiarly belonging to that Court. The warrant set out is good on the face of it, and is the regular process to bring the party into that Court in cases of similar misdemeanors. The issuing of that process is directly analogous to those orders for writs, from this and other Law Courts, called *fiats*, which are daily and hourly issued in Chamber, by every Judge in the Hall, in every civil action, in conformity to the laws of England and Ireland for centuries. But in matters which relate to breaches of the peace, which belong to the jurisdiction of the King's Bench, and its respective Judges, all their acts in such matters, and in relation to that Court, are considered as judicial acts; that is, they are the acts of a Judge, within the sphere of his judicial duty, which is all that is necessary for the present argument.

Here, then, is the head and front of that offending which the plaintiff complains of; and to which much elaborate argument has been expended, to

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[*61, n.]

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[*62, n.]

show that Magna Charta has been violated, and that the palladium of British liberty has been outrageously assailed. But it is, in fact, a complaint moving from a man who, in the case now before you, plunges out of the tribunal where he stands, as a criminal to be tried, and drags the Judge, who rendered him amenable there, into this Court, that has no cognizance of a case to which we must for ever be strangers, so far as relates to the criminal offence, *which the King's Bench only is competent to try. The common and statute law of these realms has wisely secured the independence of the judicial order in the exercise of their functions, against the vexatious suits and attacks of irritated parties, as well as against the overbearing authority of the Crown; otherwise the Judges, from the ordinary infirmities of man, might become timid administrators of justice, and inadequate guardians of the peace, the rights, and liberties of the subject.

In the particular case, where the statute has given an action to the parties aggrieved against the Judge who refuses the writ of *habeas corpus* in Vacation—2 Hawk. 147; 1 Burr. 856; and 3 Burr. 1437. In commenting on that subject, the language of the laws is, "that in all other cases, they are at liberty to exercise their sound discretion, without being liable to an action of the party; and this, say the books, is most agreeable to the general reason of the law, which regularly will not suffer a Judge to be liable for what he does as Judge, in an action by the party." 'Tis apposite to the present case to observe, that the passages alluded to, as relating to acts in Vacation, can only be applicable to the acts of a Judge done in Chamber. Such acts of a Judge of the King's Bench in the Chamber, if they belong to his office and relate to his Court, are constantly recognised and adopted as the acts of the Court at large, although no cause should be then depending. So in *Rex v. White* (1), the Court attached the party for disobedience to the Chief Justice's warrant, as a contempt of the Court to which the Judge belonged, when he was acting within the sphere of his office and the jurisdiction of the Court.

[*63, n.]

Upon this principle, the cases of *Rex v. Wilkes*, and *Rex v. Almon*, much has been published. In the valuable book, published by the title of "A Compilation of the Opinions and Judgments of Lord Chief Justice Wilmot," p. 97, that great and remarkable man appears to have given his opinion, in 1759, upon the Habeas Corpus Bill then depending, pursuant to the order of the Lords. In that opinion, so solemnly delivered to them, and now published in that well-authenticated volume, the acts done by Judges in their *Chambers, as well as the acts done in Court, "are said to form that system of practice, by which the benefit of the law is dealt out to the people."

In the case of a motion for an attachment against Almon, the printer of a libel (in the same volume) against the Chief Justice, for having rectified, by an order in Chamber, a clerical mistake in the record of an information against Mr. Wilkes, it had been argued there, as here, that the act of the Judge, as being in Chamber, was not a judicial act, and, of course, that the libeller could not be punished as for a contempt, summarily. The libel was admitted to be a gross one on the individual; but it was contended, that the Court could not take cognisance of it, by attachment. But hear the words of Sir EARDLY WILMOT. "This is a gross charge upon a Judge of this Court, of his endeavouring to subvert the constitutional liberty of the subject;" and page 259, "the constitution has provided remedies for the involuntary mistakes of Judges; and for the punishing and removing them for voluntary perversions of justice. Is it possible to stab the authority of a Court more fatally, than by charging the Court, and particularly the Chief Justice, with such an act?" And in p. 269, he proceeds, "I can make no difference between a Judge, acting in Court, judicially, and out of Court, but that he

has not the same plenitude of power; but still he acts under the patent which made him a Judge. When he issues the warrant as conservator of the peace, the Court punishes the disobedience; why? Because it is the act of a Judge, in his judicial capacity. The libel is on his conduct in his official capacity of Judge, for what he does in his Chamber, imputing to the King a breach of that oath which he took at his coronation, to administer justice to his people. Striking a Judge in the street would not be a contempt; but 'tis otherwise if he is in the exercise of his duty: 'Tis for the sake of the publick." Such is the powerful reasoning of that upright man, of authoritative wisdom. And you find the doctrine recognised almost as an axiom by Judge BULLER, in the well-known case of *Sutton v. Johnstone* (1). "No action," says he, "lies against a Judge, for acts done in that capacity. The law raises a presumption in *favour of the Judge, and will not (as in ordinary cases) suffer that presumption to be rebutted. If otherwise, it would deter them from doing their duty." In *Le Cœur v. Eden* (2): "A negative usage is a strong argument; the universal silence of Westminster Hall is an authority, that no such action is maintainable;" and p. 535, "there is no Court equal to the trial of a superior Judge."

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[*64, n.]

Yet here the Court of Common Pleas is called upon to try the Chief Justice of the King's Bench, for having acted in preservation of the public peace, over which he has the primary superintendence and jurisdiction; and over which we have no jurisdiction whatsoever. Is that great Court to have its functions paralysed in the cause now vested and in progress there; and to wait until the Common Pleas examines the conduct of the Chief Justice, and the nature of the offence, which he has presumed to bring within his cognizance by means of that very process which is the subject-matter of our present investigation, and which has held the present plaintiff to be amenable *in alieno foro*?

As to the arguments that have been adduced by plaintiff's counsel, from the case of *Bridgeman v. Holt* (3), they are founded on the Statute of Westminster, which gives the remedy to the party aggrieved, when the Judge shall refuse to put his seal to a bill of exceptions; and gives an action against the Judge for a false return (4), "that particular right of action flows from the statute; and so it is in all statutes commanding a thing to be done, as a ministerial act; and so says Lord Keeper NORTH." Suppose no such statute existed as that which I have just mentioned, the reasoning in *Bridgeman v. Holt* demonstrates that the right of action in that particular case is founded on the statute only; and it was strongly contended by the plaintiff in that case that the proper mode of redress was by appeal to Parliament; and no record exists of any such action having been brought; and no opinion was given *by the Lords in *Bridgeman v. Holt*—at all events, there is nothing in that case that bears upon the present. The question here comes to this, whether this Court can erect itself into a court of control over the Chief Justice, and his brethren of the Court of King's Bench, in matters of their peculiar jurisdiction.

[*65, n.]

But let us pause for a moment, to consider the character, station, and public responsibility of the Lord Chief Justice of the King's Bench. The law has imposed upon him the high duties incident to his judicial office, of being a principal conservator of the peace. He is the trustworthy guardian of that portion of the King's prerogative which affords the protection of the law to his people. "He should be ready," say the books (5), "to act with promptitude and vigour, *pro salute reipublice*. He is entrusted with the highest jurisdiction, not only in capital cases, but also in all misdemeanors whatsoever of a criminal nature, tending to a breach of the peace, or oppression of the subject, or of the raising of faction, or any manner of misgovernment; and 'tis not necessary to

(1) 1 R. R. 257 (1 T. R. 493).

(4) 2 Inst.

(2) Doug. 517.

(5) 4 Inst. 71, and 11 Co. Rep. 98.

(3) Show. P. C. 122.

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show a precedent, of the like crime of being acted against: wherever it is against principles of justice, or dangerous in its consequences, it should be restrained by the Custos Morum and principal conservator of the peace of the realm."

[*66, n.]

Of such description is the defendant, against whom the plaintiff brings his suit, to be reprimed in damages by a jury, for having exercised his bounden duty as a Judge. I have mentioned the privileges with which the common law has clothed the Judge, as emanating from the King, as the fountain of justice and the general conservator of the peace of the kingdom. The 27 Hen. VIII. c. 2, after reciting many of the prerogatives of the Crown, touching the administration of justice, declares the sole power of the King to make Judges. To that King in his Parliament the Judges have an awful responsibility. By the 12 & 13 of Will. III. c. 2, s. 3, at the era of renovating liberties of England, the Judges' commissions were made "*Quam diu se bene gesserit*." By the uniform usage of many ages, our Kings have delegated their whole judicial power to the Judges of the several Courts. In the first year of the *auspicious reign of his present Majesty (1), the statute recites the monarch's declaration from the throne; "that the Judges' independence and uprightness are essential to the administration of justice;" and it continues their commissions beyond the demise of the Crown, with a proviso, that they may be removed by address of both Houses of Parliament. By the 21 & 22 of Geo. III. c. 50 (Irish stat.), these great privileges are confirmed to the Judges of Ireland; the power of removing them for misconduct is recognised; and the right to impeach them before the King in Parliament, according to ancient law and usage, is matter of right to those who may suffer from their corruptions or oppressions: and as Judge BULLER says, in *Mostyn v. Fabrigas*—"For error of judgment or mistake, a Judge is not answerable to the King or the party; for that this would expose the justice of the nation, and no man would undertake the office at peril of action or indictment for his judicial acts." And such is the language of *Bushell's case* (2)—"If Judges have given corrupt judgments, they have in all ages been complained of to the King, in the Star Chamber or Parliament; and so says Andrew Horner, in his *Mirror of Justice*; and so in the case of *Ship-money*."

As to the objection that there is no averment in this plea, of an information on oath to ground the warrant. Were the plaintiff brought up on *habeas corpus* to be enlarged without bail, upon a return of the warrant and commitment, this Court would remand him. The warrant is good on the face of it.

[*67, n.]

In *Wilkes's case* (3), on a similar motion, and objections, Lord Chief Justice PRATT said, that "the setting out the evidence was not essential to the validity of the warrant;" and he takes the distinction as to *Rudyard's case* (4), which was a commitment in execution on a conviction of an inferior Court, which conviction must set out the evidence, that the superior Court may judge of it; but that Coke, Hale, and Hawkins had not considered that essential in a warrant to arrest; and he goes on: "I rely on the silence of the case *of the *Seven Bishops*, when the similar warrant was not objected to by defendant's counsel, the greatest lawyers of that day, and all lovers of liberty." But the argument, as put here, would be to disarm the conservator of his most salutary powers. If all the formalities contended for are to be observed by the Chief Justice and his brethren, what will become of the public safety, in the variety of instances mentioned in Hale, P. C. and 2 Rolle, Ab. 134, where the Judge may order his tipstaff to arrest, *ore tenus*, and without warrant? If there was not such a power justifiable and ready in acting, on the pressing occasions of imminent danger, the sudden bursts of outrage would scoff at the impotence of the first magistrate in the law.

I come now to a part of the plaintiff's argument, which would endeavour to

(1) 1 Geo. III. c. 23.

(3) 2 Will. 150.

(2) Vaugh. 134.

(4) 2 Vent.

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obviate the glaring consequence of clashing jurisdictions. Upon this plea, thus demurred to, it appears, that in consequence of the warrant and arrest, the party plaintiff, and the cause in which he is held to bail, are, in contemplation of law, *sub judice*, in a cause in the King's Bench. The present action is sought to be converted into a species of *certiorari*, to remove that original cause into this Court. In the case of *Burdett v. Abbot*, as fully reported in 14 East, 64, *Holroyd*, for the plaintiff, in arguing the demurrer to the defendant's plea, which set forth the order of the Commons, and relied on it, there admitted, that, if the matter had come before the Court on a return to a *habeas corpus*, the Court would have remanded the plaintiff; "because," said he, "he is, as it were, in custody, in the committing Court"—(so situate exactly, is the plaintiff here); and *Holroyd* goes on to argue, that "if the Court were to discharge the plaintiff, it would be assuming a jurisdiction over proceedings of another Court." But he proceeds to argue, "that the party may have his action, if aggrieved;" disputing the privilege to commit. Lord ELLENBOROUGH immediately observed, "then you give up *Bushell's* case, which was a similar interference." *Holroyd* then makes the distinction, that "*Bushell's* case was a committal by a court of oyer and terminer." Lord ELLENBOROUGH then questions the position in *Bushell's* case, "that the committal and the cause of it ought to be made appear to the Court, where the *habeas corpus* is returned, as it appeared to the Court committing." *Holroyd* then starts another distinction, between a committal as in *Burdett's* case, being a sentence of punishment, and a committal for trial, which must take place in a reasonable time, or the prisoner be discharged; in which case *Holroyd's* argument necessarily infers, that in such case of an arrest (as here) by way of process, to hold to bail in another jurisdiction, (and that, too, the first Criminal Court,) it cannot be questioned. In p. 123 of the volume last cited, during *Mr. Holroyd's* very ingenious argument, Mr. Justice BAYLEY observes to him, that he had not answered the question that was put to him, viz. "Whether an action would lie in the Common Pleas against an officer of the King's Bench for executing its warrant for a contempt, to question the validity of the commitment; or whether an action would lie against the Judge or Judges who signed such warrant?" *Holroyd* answers, "Certainly no action will lie against the Judges, they are answerable in another way, and no action will lie against them."

[*68, n.]

Here, then, the counsel for Mr. Taaffe in Ireland have got a full answer and refutation from Sir Francis Burdett's counsel in Westminster Hall. *Holroyd* there supposed a case where the Judges might issue a warrant, in a matter of which they had no jurisdiction; and which appeared so on the face of the warrant, on return to the *habeas corpus*.

Lord ELLENBOROUGH asks, "Is there any case where, when such discharge had been refused on an *habeas corpus*, that the Court has held out the consolation, that though they could not discharge, yet that the party had his remedy by action?" Lord ELLENBOROUGH then adverts to cases of *Crobie* and *Oliver*, and says, "that *Serjeant Glynn* never advised an action of trespass, after they were remanded, and none was ever brought, to leave the matter of law to the jury."

Demonstrably, that is the struggle by the plaintiff here; and that too, without adverting to the principle in *Morgan v. Hughes* (1), where it was incumbent on the party, in an action for malicious arrest, to show the cause at an end; but here the pleadings, "as they now stand in this case, lay a foundation to presume that the present plaintiff may be at present a convicted criminal in the Court of King's Bench, seeking from a jury in the Common Pleas, to make the Chief Justice reprove the plaintiff the full amount of the fine, which he may have been sentenced by the King's Bench to pay to the Crown."

[*69, n.]

When *Magna Charta* is said to be infringed by the issuing of the process, or

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warrant in question, we should recollect that the plaintiff complains of an unauthorized force of the defendant, in issuing the judicial process spread in the plea, which is demurred to.

The arguments in *Bushell's* case have been resorted to, where much encouragement was given to bring an action against the Recorder of London, and others of his Court, in a case which savoured strongly of oppression—yet, when this action was brought before Lord Chief Justice Hale and his brethren in the King's Bench, on a motion in that Court on the part of the defendant for time to plead, that just and constitutional Judge expresses himself, without doubt or hesitation, as follows: "That the action would not lie; and that although the judgment of committal had stood reversed, by the proceeding on the *habeas corpus* in the Common Pleas, yet no action could be maintained against the Judge, for such judicial act." That indeed "was a case of actual imprisonment; but this is a complaint of one, who disdains to be rendered amenable to that Court, where in contemplation of law he is in custody."

From the 21st James I. to the 43rd George III., a great code of statutes exist (1), in England and Ireland, defining the powers of justices of peace, and officers of the law and revenue. The same laws afford them great advantages, of defence, of notice, and of pleading the general issue, without the embarrassments of pleading special justifications; and the law remunerated them with double costs, if sued without foundation. But where are the similar protections, in the Statute Books, for the Judges of the land? There are none such; and the necessary inference is, that the immemorial sense of the Legislature is, that that privileged order is protected, by peculiar, inherent, and unquestioned *privileges; otherwise they never could have remained unprotected against vexatious litigation, upon every frivolous occasion. Some difficulty arose in the case of *General Warrants* (2) and *Key v. Earbury* (3) as to the privileges to which a Secretary of State was entitled, in issuing his warrant for minor offences. It is not for me to animadvert upon the judgment of the great man who pronounced a judgment in that case, with popular applause; but I find Lord KENYON, in *Despard's* case, of modern authority, questioning that decision.

But was it ever doubted, in that or any other case, until the present, that the privileges of the office of the Lord Chief Justice attend upon him, as incident to his office, in every department of his official duty, and in every part of the realm, within which he is Chief Justice? The power of a Judge, sitting in Court during the Term, does not amount to one-fourth part of each revolving year. Is it for that short period only, that the Chief Justices are to be considered as judicial; and on all other occasions as merely ministerial, and liable to action? There is no question, that the justice of peace, in his ministerial capacity, is liable; but could the King's Bench entertain complaint or information against one of its own Judges, in his own Court, for having issued the process of their Court? The King's Bench could not, would not, ought not. But it is argued that the Common Pleas would, could, and ought; and in the language of the law, that great law officer, the Chief Justice, is now attached to answer, and awaiting our decision, whether we shall retain him as a defendant, to answer for the exercise of his judicial discretion, in matters within his special jurisdiction, and of high importance to the public peace, and most properly submitted to his judicial wisdom.

The transaction in question arises out of an Act of Parliament, creating offences spread on the face of the warrant as set forth in the plea, which Act is made to guard against a prevalent mischief, that the history of our own times have evinced to be productive of danger to the State. It was a matter of no inconsiderable moment, to have the highest judicial sanction to the process and

(1) *Sic.*

(3) 1 Ha. Pl. c. 562.

(2) Reported 19 State Trials, 1154.

warrant, *framed upon a modern statute, and giving operation to the law. The offence described in the warrant is founded on the Convention Act of 1793. We all know the history of that law, the preamble of which was soon followed by the Legislature of England in her enactments, to meet the prevalent mischiefs of self-elected societies, and the tumultuous assemblies who filled the audiences of such enlightened revolutionists as orator Thelwall. When Lord Grenville, in the House of Lords, enforced the necessity of those laws, he wisely observed, "that those clubs and societies, in imitation of the similar societies in France, were founded on what was called 'The Rights of Man;' they were rights however, (as they explained them) such as were incompatible with law, religion, order, and morality." These societies had eloquent partizans; petitions crowded the table of the House of Commons; and Magna Charta and the Bill of Rights were sounded forth with popular confidence. "*Lex denique lata.*" This law of Irish legislation was, in principle, adopted in England; and the political fame of Sir William Grant, in the course of the debates on that subject, raised him to conspicuous eminence by his luminous argument, which settled the vibrating opinion. The laws in each country, *in pari materia*, were the same in principle.

The licentious spirit in England was put down by the vigour of the law, and the returning good sense of the people. When it was of late unfortunately become imperatively necessary to bring that Convention Act into operation here, I cannot subscribe to the confident assertion of its having been unbecoming the high office of the Chief Justice, to grant a warrant which might have been issued by a common magistrate. As this argument has been obtruded upon the case, I think it right to say, that in my opinion it was a well advised measure to resort to the highest judicial authority, who was competent to give his sanction to the warrant, which delineates and defines the offence, with legal and technical accuracy. The present action is a bold effort to render the law inoperative in Ireland. If the defendant had been an inferior magistrate, slanderous publications and liability to action might create terror in the humble mind of an ordinary justice of peace, to deter him from issuing his warrant, in the first instance of acting upon the statute: but the law officers *of the Crown would have been culpable in the extreme, where the peace of the country was at stake, if they had not taken the most effectual means to prevent the inchoate mischief, with the aid of the first criminal Judge,—to make the party amenable to the highest criminal tribunal, to be dealt with according to law. If matters had not been so conducted, the law might have been condemned as a dead letter, and become rusty as old armoury in the Tower: the factious might then exult, that they had worked a virtual repeal of the law.

In the case of *Rex v. Despard* (1), when *Ferguson* moved for the prisoner's discharge, who was committed for treasonable practices, as the warrant had not delineated his offence with certainty; and it was argued there, as here, that there was no adjudged case upon the point; but it was well answered, that if no point is to be considered as law, unless it has been judicially decided, then farewell the law of the land, and it is sufficient, if it has been considered law at all times. It has been observed also, that no such plea as the present, ever was judicially sanctioned; that is probably true, for no such action was ever brought before; and as Lord KENYON observed, in the case I have cited, "Though experiments of this kind are frequently made, they seldom succeed. I will not," said he, "overturn the law of the land, as it has been handed down to me. It is not for Judges, who are to watch over the law, to overset it. I am clearly of opinion, that if we are to yield to this argument, we should forget the duty we owe to the public." Before I conclude, let me compose the hitherto undisturbed ashes of Lord Chief Justice WILMOT, of whose character and opinions much has been misconceived. On the present occasion I cannot humiliate the great man's memory, by entering into a laboured vindication of one of the purest judicial characters that ever adorned

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Westminster Hall. There WILMOT has ever been considered "*Clarum et venerabile nomen*," his opinions and judgments are there, as I hope they will be here, of high authority; and are treated with respect, whenever they are cited; as in the late case of *Burdett v. Abbot*, when the *Attorney-General* resorts to his admirable argument, as he calls it, in *Rex v. Almon*.

ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY (1).

THOMAS HUDSON BATEMAN AND ROBERT HENRY
WELCH *v.* ELLEN PENNINGTON.

(3 Moore, P. C. 223—228.)

1840.
July 10.
1841.
July 3.

Lord
BROUGHAM.
[223]

Probate granted of a paper written in ink, but dated and signed in pencil, with the addition "in case of accident, I sign this my will;" having also an attestation clause unsigned: the facts pleaded in the allegation being sufficient to rebut the legal presumption against the paper. On reversing the decision of the Prerogative Court rejecting an allegation pleading circumstances to entitle a paper to probate, the Judicial Committee retained the cause, and ultimately granted probate of the instrument.

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THIS was a cause of proving, in solemn form of law, the will of Richard Sparling Berry, bearing date the 5th day of October, 1837, promoted by the appellants, Thomas Hudson Bateman and Robert Henry Welch, two of his executors therein named, against the respondent, *Ellen Pennington, the aunt and only next of kin of the deceased.

The testator died suddenly, on the night of the 29th of January, 1838. On the following morning search was made, and in the repositories of the deceased was (2) found two testamentary papers. The body of the first paper was written in ink, but the date of the 5th of October, 1837, was inserted in pencil in the third line; the signature of the testator was likewise written in pencil, and was preceded by the following words, also in pencil—"in case of accident I sign this my will;" there was also a clause of attestation, but without the subscription of any witness. By this instrument the testator, among other things, named and appointed William Sparling, Thomas Hudson Bateman, and Robert Henry Welch, his executors.

The second paper was without date, but it was subscribed by the testator in ink: to this paper also there was a clause of attestation, without the subscription of any witness. In this instrument William Sparling, Thomas Green and Robert Henry Welch were named as joint executors.

The deceased, at the time of his death, was seised of, or entitled

(1) Present: Mr. Baron Parke, Mr. and the Right Hon. Dr. Lushington.
Justice Bosanquet, Mr. Justice Erskine (2) *Sic*.

to, real estate of considerable value, and was also possessed of personal estate of the value of 28,000*l*.

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F.
PENNING-
TON.

Shortly after the testator's death, proceedings were instituted in the Prerogative Court of Canterbury, on behalf of the appellants as the executors named in the paper dated the 5th of October, 1837, calling upon Mrs. Ellen Pennington, widow, the aunt and only next of kin of the deceased, to see the will propounded in solemn form of law. An allegation setting forth the above facts and propounding the paper was, *after argument, on the 11th of June, 1838, rejected by the learned Judge.

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From this rejection an appeal was interposed by the appellants.

Mr. Pemberton, Q. C., and *Dr. Addams*, for the appellants :

The question which the Court of Probate would ultimately have had to decide was, whether the paper of the 5th of October, 1837, was not intended by the deceased as an interim instrument. "In case of accident I sign this my will;" these words import the intention not to die intestate: *Castle v. Torre* (1). The circumstances of the words being in pencil, and apparently added after the body of the paper was written, cannot vary the effect of the paper. There is no dispute respecting the handwriting—both pencil and ink are in that of the deceased. If the will purported to dispose of personalty only, there could be no question of its validity; does the fact then of there being an attestation clause, and a disposition of the real estate as well as the personal, so avoid the paper as to make it not admissible to probate? In *Smith v. Brown* (2), the real and personal estates were blended together, both funds were charged with the payment of debts and legacies; there was besides, no internal evidence, as here, to show that the paper was intended to operate as an interim instrument. In *Warburton v. Burrows* (3), an unexecuted will was pronounced for, though it appeared that the fair copy had been prepared for execution two months previous to the death *of the testator; there was evidence to show that it had received his final approval; that he was of procrastinating habit; and that he died suddenly of apoplexy. But the Court below ought at least to have admitted the allegation and allowed proof of the facts pleaded, whatever ultimate decision it might have come to: *Steward v. Steward* (4). There is enough upon the face of the paper to entitle us to propound it, even if the Court of Probate should think it was not entitled to proof.

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(1) 46 B. B. 5 (2 Moore, P. C. 133).

(3) 1 Addams, Ecc. Rep. 383.

(2) 3 Knapp, P. C. Cases, 1.

(4) 2 Moore, P. C. 193.

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Mr. Kindersley, Q. C., and Dr. Phillimore, for the respondent :

The presumption of law being against the validity of the instrument, the circumstances pleaded in the allegation, if proved, would not be of force sufficient to rebut that presumption. That is the ground upon which the Court below proceeded. The doctrine of the Ecclesiastical Courts is, that *prima facie* the presumption is that pencil alterations are deliberative, and those in ink final: *Hawkes v. Hawkes* (1), *Edwards v. Astley* (2). In the former it is considered merely as a memorandum for future deliberation, not intended to operate as a final instrument: *Rymes v. Clarkson* (3). It is true this presumption may be rebutted; but no fact pleaded in this allegation is sufficient for that purpose; the words relied on, "in case of accident I sign this my will," do not import that the deceased intended that paper to act as a will; but at the highest, show that they were his final instructions. There is, besides, an attestation clause unwitnessed; *and that again affords a presumption against the paper as a will: *Beaty v. Beaty* (4), *Harris v. Bedford* (5). There were sufficient grounds for the judgment of the Court below, which assumes that if the facts stated in the allegation were proved, they would not be sufficient to entitle the paper to probate.

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LORD BROUGHAM :

The pressure of the case arises from the words in pencil, "in case of accident I sign this my will;" and the question is, are they deliberative or final? If the words had been, "I sign this my will, in case of accidents," though such signature was in pencil, could it be contended to be only deliberative? or if he had said, "I write this in pencil, in case of accidents," and had then signed his name, could that be held not to be a good signing? But all the circumstances of the case must be looked at; and the question their Lordships have to determine is, not whether the circumstance of the date and signature being in pencil, imports that the paper was deliberative, or the circumstance of the attestation clause being unwitnessed is so strong a presumption against the paper as a will, that the fact stated in the allegation, namely, the intention of the deceased to die testate, and the sudden death ought not to be admitted to proof in order to rebut the presumption afforded by the condition of the instrument itself.

(1) 1 Hagg. Ecc. Rep. 321.

(2) *Ib.* 491.

(3) 1 Phill. Rep. 35.

(4) 1 Add. Ecc. Rep. 154.

(5) 2 Phill. Ecc. Rep. 177.

All the cases show that, in either instance, the fact of the signing being in pencil, though *primâ facie* a presumption that the act is only deliberative, yet it may be shown to be otherwise; and so the presumption against a will having an attestation clause without witnesses may be *repelled. And, in either case, if the facts in this allegation are proved, the legal presumption would be negatived, and the appellant entitled to probate. Their Lordships are, therefore, of opinion that the sentence of the Court below, rejecting the allegation, ought to be reversed, and that the appellant must be admitted to his proofs; for which purpose they will retain the cause.

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The allegation and exhibits being admitted to proof, five witnesses were examined by Commission. No allegation was offered on the part of the respondent. Publication was decreed, and the cause assigned for final hearing before the Judicial Committee, when their Lordships (1) decreed probate: the costs of all parties to be paid out of the estate.

1841.
July 3.

ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY (2).

CHARLES HARWOOD *v.* MARIA BAKER (3).

(3 Moore, P. C. 282-314.)

1840.
Dec. 11, 12,
16, 17.

ERSKINE, J.
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A will executed by a testator on his death-bed in favour of his wife, to the exclusion of the other members of his family, the testator being of a weakened and impaired capacity at the time of the *factum*, from disease affecting the brain, which produced torpor, and rendered his mind incapable of exertion unless roused, pronounced against: the disposition in the will being a total departure from, and contrary to, the previous expressed intentions of the testator.

To constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of the property, and the nature of the claims of others, whom by his will he is excluding from participation in that property.

THIS was an appeal from a sentence of the Prerogative Court of Canterbury, revoking probate of the will of Thomas Edward Baker, granted in common form to Mary Ann Baker, afterwards Mary Ann Harwood, the widow of Thomas Edward Baker, and the sole executor and universal legatee named in the said will; the facts and circumstances of the case are fully set forth in the judgment.

(1) Present: Lord Brougham, Mr. Baron Parke, Sir Herbert Jenner, and the Right Hon. Dr. Lushington.

and Mr. Justice Erskine.

(2) Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet,

(3) Cited by COCKBURN, Ch. J. in the judgment of the COURT, *Banks v. Goodfellow* (1870) L. R. 5 Q. B. 549, 568, 569.

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The case was argued by

Sir William Follett, Q. C., and Dr. Addams, for the appellant; and

Mr. Pemberton, Q. C., and Dr. Phillimore, on behalf of the respondent.

[The arguments on both sides turned wholly on a comparison of the evidence adduced, and of the degrees of credit due to the several witnesses; but the decision, containing an exposition of the capacity necessary to constitute a testamentary disposition, is given at length. *Ingram v. Wyatt* (1), *Marsh v. Tyrrell* (2), and *Barry v. Butlin* (3), were referred to.]

ERSKINE, J. :

This case came on upon appeal from the sentence of the Prerogative Court of Canterbury, by which the learned Judge of that Court revoked the probate which had been granted of the will of Thomas Edward Baker, late of Bath Place, Kensington.

Mr. Baker died in the night of the 27th of March, 1833, and shortly after his death, a *caveat* was entered on behalf of Mr. George Baker, a relation, but not the next of kin of the deceased, against the issuing of any probate of the paper in dispute; but that *caveat* having been afterwards withdrawn, probate was, on the 18th of April, 1833, granted in the common form to the widow of the deceased as sole executrix, and who was also the universal legatee under the will.

In the month of May, 1834, Mrs. Baker married the appellant Harwood, and she died in the month of October, 1835, having by her will, executed under a power, appointed her husband sole executor.

In the month of January, 1836, the probate which had been granted to Mrs. Baker was called in by Maria Baker, who alleged herself to be next of kin, and who was admitted to oppose the will; and thereupon the paper was propounded by Mr. Harwood, in a common *condidit*, *upon which three witnesses were examined—Mr. William Knight, solicitor, the drawer of the will, Mr. William Smith, a friend of the deceased, and Mr. James Pollock, who attended the deceased in his last illness as the assistant of Mr. Andrew Carrick, a surgeon and apothecary. The two former were attesting witnesses to the will. The third attesting witness, Sophia

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(1) 1 Hagg. Ecc. Rep. 384.

(2) 2 Hagg. Ecc. Rep. 84.

(3) 46 R. R. 123 (2 Moore, P. C.

480; and 1 Curteis, Ecc. Rep. 614).

Reader, was not examined in chief by Mr. Harwood, but was examined upon interrogatories by Maria Baker.

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Several other witnesses were afterwards examined on allegations asserted and admitted on both sides, and four several testamentary scripts of the deceased, besides that propounded as his will, were brought in annexed to the affidavit of script of Mr. Harwood.

The learned Judge having heard the cause on the 5th of August, 1837, by his decree pronounced against the force and validity of the pretended will, upon the ground that the evidence adduced was not sufficient to prove that the deceased was a capable testator.

From this decree the present appeal has been instituted by Mr. Harwood, and the case was very ably argued in December last, when judgment was deferred, and now, after a careful examination of all the evidence in the cause, their Lordships concur in the opinion expressed by the learned Judge below, that the party propounding the will has not satisfactorily proved, as he was bound to do, that the paper in question does contain the last will and testament of the deceased.

As their Lordships do not however view some of the evidence in the same light in which it was viewed by the Court below, it will be necessary to state the particular grounds upon which they have come to the same result.

It appears by the evidence, that Mr. Baker died *about 12 o'clock in the night of the 27th March, 1833; that the paper propounded as his will was executed about 7 o'clock in the evening of that day. According to the evidence of Carrick, one of his medical attendants, at 9 o'clock that evening, Mr. Baker was nearly insensible, unconscious, incapable of any act whatever—he was actually dying. The will, when produced, is found to be signed only with a mark, and had evidently been with a very feeble hand. When, therefore, a Court finds that the paper propounded as the will of the deceased was executed in the manner stated, only two hours before he is found by his medical attendant in an unconscious and dying state, and only five hours before his death, it becomes the duty of the Court to require the most satisfactory proof, that at the time when the will was executed, the deceased was not only aware of the disposition he was making of his property, but that he was in a state of mind to judge of the propriety of that disposition.

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The infirmity of mind suggested by the respondent, and relied on by the Court below, is not an incapacity arising from any delusion or from any constitutional or long-established infirmity of mind,

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but one occasioned by a recent accession of bodily disease affecting the brain, and producing torpor, and thereby rendering the mind incapable of exerting those faculties which are essential to a sound and disposing mind and memory.

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In order, therefore, to form an accurate opinion of the condition of the mind of the deceased at the time of making his will, it will not be necessary to go further back than the 21st of March, 1833, when he was first seized with the illness which terminated in *his death on the 27th of the same month; for before that time it is admitted by all parties that the deceased was fully competent to make any testamentary disposition of his property.

The earliest account that the evidence furnishes of the nature of the attack and the early progress of the disease, is that which is derived from the statement made by Mrs. Baker, in a letter to Mr. Flooks, a friend of the deceased. This letter is dated April 6th, 1833, about nine days after her husband's death, in which she says, "It is now a fortnight last Thursday (this would be the 22nd of March) since my dear Mr. Baker went into town to attend a meeting of the Bank Directors to declare a dividend, and as he went through Temple Bar he felt himself seized with a violent shivering fit. He however proceeded to the Bank of England, and got, as soon as possible, before a great fire; still the shivering continued, to that degree, that he was unable to go and hear the speaker's speech, which vexed him very much, and he got in a coach, and returned home. When he came back, his looks nearly frightened me to death. We placed him instantly in a hot bed, and from that moment I never left him. He died on the following Wednesday. He was sensible to the last moment; but the stroke, which was paralytic, deprived him of the use of his right side;" and then she proceeds to allude to the making of the will, and Mr. Smith's visit.

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Mr. Carrick was called in on the 22nd of March, and he says he found the deceased in bed, very ill, having a high degree of fever and erysipelas—affection of the brain, producing a considerable degree of stupor. Carrick then adds, "During the few days he continued to live, I saw him repeatedly, at least four times a-day. *For a day or two the disorder was stationary—one could not say he was better or worse—but the bowel complaint continued obstinately; debility gradually increased, and stupor also continued. The brain was implicated, so that he required to be roused before he would speak, though he was quite rational, and expressed his feelings correctly, in reply to the medical inquiries addressed to him. He

was not irrational—there was no delirium—only when not roused, he sank into a depressed state of drowsiness and stupor, such as I have described. He knew me perfectly well, and all about him, when roused from the stupor, in which he would have continued if not disturbed. When roused, he answered my questions very rationally, but immediately relapsed into a state of stupor. He was exceedingly drowsy. As far as I could judge, from what I personally observed, I consider the deceased to have been, during the illness of which I am now deposing, incapable of doing a rational act of an important nature, requiring thought, judgment, and reflection, or (on account of great exhaustion of his bodily and mental powers) of resisting undue influence and control.”

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Mr. Hawkins, who was called in by Carrick, and saw Mr. Baker as it should seem on the 23rd, and every subsequent day till he died, describes Mr. Baker's state in substance much as Carrick does, though he seems to have forgotten the attack of the bowels, and thinks that though they apprehended apoplexy, they ascertained there really was no tendency to it when the disease was fully understood. But these differences in the recollection of the two witnesses cannot affect the credit due to the substance of their testimony, in which they agree: for no suggestion has been made against *the perfect honesty of their intentions to represent the truth. Hawkins then entirely agrees with Carrick in describing the effect produced by the disease, for he says, “He was, throughout my attendance upon him, in a torpid and drowsy state. He required to be roused, to say anything, for most of the period of my attendance. He recognized persons, when he was told who they were. He was capable of answering questions—short questions—but not capable of continued conversation.” And then he proceeds to state, that even in answering simple questions, he was sometimes besides the mark; a circumstance which, as it appears that the deceased was hard of hearing, and Hawkins himself states that it was necessary to speak loud to make him hear, may be fairly attributed more to the dulness of hearing than to any incoherence of understanding, for none of the other witnesses speak of any such incoherence; but there is one part of Hawkins's testimony, which is given in answer to the eleventh interrogatory, which is of much importance, as indicating a condition of mind not likely to vary at different periods, so as to admit of the conclusions contended for by the appellant, that although the mind of the deceased might generally be in a drowsy and torpid state, yet that under circumstances of excitement,

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it might be roused into a capacity to comprehend and deal with subjects requiring thought, reflection, memory, and judgment.

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By the eleventh interrogatory, each witness is asked, "Are not the observers, whether professional or unprofessional, of a sick person in a state of exhaustion, frequently deceived and surprised at the degree of energy such sick persons can bring to bear, when roused by any important subject?" Both Carrick and Hawkins *answer this question in the affirmative, and Carrick adds, "I do not consider that the deceased's state of exhaustion was such as not to admit of his attention being aroused to any subject of importance;" an answer which, taken in connection with the rest of his evidence, must in fairness be taken to convey his opinion that the incapacity of the deceased, of which he had previously spoken, was the consequence of exhaustion, which might, therefore, so far be removed by excitement, as to admit of a temporary interval in which the mind might assume a testamentary capacity. Hawkins, however, though he answers the interrogatory also in the affirmative, adds an observation, to show that such answer would not warrant the conclusion that Mr. Baker might have been roused to a state of mental energy by the excitement of an important subject; for he says, "But Mr. Baker's was not a mere state of exhaustion, it was oppression of the brain. His state of exhaustion was not such as would not admit of his arousing his attention so far as to answer a question;" but he adds, "he did not always do that correctly, and I don't think he spoke a single word, but in answer to questions. The importance of a subject would not, I think, have made any difference in arousing his attention." Both of these gentlemen, after being shown the affidavit made by Pollock on the occasion of the proof of the will by Mrs. Baker, decline swearing that Mr. Baker could not have been, at the time of the execution of the will, of sufficient capacity to make his will. Hawkins admits that there might have been a time during his illness when he could understand questions put to him, and answer them so as to make a short will. And Carrick says, "He had so far thought and judgment, that he could, *when roused, express what his feelings were. A simple matter placed before him he might understand, but, from the state of his brain, I do not consider that he was capable of suggesting anything, or of undertaking what was complex."

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Both these gentlemen, therefore, seem to think that the deceased might have been sufficiently aroused from the state of torpor to which he had been reduced by his illness, to assent to so simple

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a disposition of his property as that made by the will in question ; but that it would have been impossible to have made him comprehend the details of a more complex distribution.

But their Lordships are of opinion, that in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard ; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property ; and that the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration ; and, therefore, the question which their Lordships propose to decide in this case, is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of *deliberately forming an intelligent purpose of excluding them from any share of his property.

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If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question as to his capacity.

Next to the medical attendants, the most important witnesses would be those inmates of Mr. Baker's house, who were in the habit of attending him in his illness, and who would have the most frequent opportunities of watching and observing the condition of his mind during the progress of his disease. Unfortunately for the ends of justice, the two principal attendants have placed themselves in such a position, that even the counsel for the parties in whose favour they speak were compelled to renounce all confidence in their evidence. For Sophia Reader, one of Mr. Baker's servants, and one of the attesting witnesses to the will, (who was not examined in chief on the *condidit*, in consequence of contradictory statements made by her out of Court,) on her examination on the interrogatories administered by the respondent, describes the deceased as wholly insensible to what was going on, and incapable of understanding the contents

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of the will, but she was proved to have stated to Mr. Bee, the clerk of Mr. Harwood's attorney, when examined by him, for the purpose of ascertaining the circumstances under which the will was made, that the will was read over to Mr. Baker, who seemed perfectly sensible at the time, and to understand the nature of it, and stated himself to be perfectly satisfied with it. On the testimony of this witness, therefore, whose *evidence is directly contradicted by her own attestation to the will, and by her subsequent statements, and also opposed to the evidence of creditable and respectable witnesses, it is impossible for their Lordships to place any reliance.

Sarah Taylor, who was in constant attendance upon Mr. Baker as nurse, would have been another most material witness, if her evidence had been more consistent with the testimony of those witnesses whose respectability place their veracity above the reach of suspicion, and whose means of knowledge were sufficient to exclude the supposition of mistake ; but her statements are obviously so strained beyond the truth in many points, that it is impossible with any safety to rely upon her testimony.

Neither is the evidence of Catherine Macnabb, the only other servant who had any opportunity of observing Mr. Baker's state of mind, of much greater value ; for as the two other attendants have extravagantly over-rated the imbecility of Mr. Baker, and the importunity and violence of Mrs. Baker, this witness as extravagantly under-rated the effect of his illness, both upon his mind and body ; representing Mr. Baker as not being in a torpid or weak state of either mind or body, and as not being heavy nor more than usually sleepy ; her evidence, therefore, may be fairly set against that of Sarah Taylor, and both of them may be rejected as unsafe guides in the investigation of truth.

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Marian Elizabeth Rosamond (Mr. Baker's niece) was also examined for the appellants, and stated that she believed that Mr. Baker was, during the whole of his illness, of sound mind, memory, and understanding, and capable of resisting control and undue influence, *and of doing any act requiring thought, judgment, and reflection. In her answer to the fourth interrogatory, she adds, that he was feeble of body, but not of mind, and was quite capable of mental exertion ; and in her answer to the seventh interrogatory, she persists in stating that Mr. Baker was sensible to the last moment.

The bias under which this witness may be supposed to speak, would require that any opinion or judgment formed by her upon

the subject of Mr. Baker's capacity should be received with caution, and that the facts to which she deposes, as forming the ground of that opinion, should be closely examined, especially when she is found making statements in direct contradiction to those of the medical attendants. She swears that Mr. Baker was not generally during his illness in a torpid state of body or mind. Carrick, Hawkins, and Pollock, all swear that he was; she states that Mr. Baker was sensible to the last moment: Carrick says he was nearly insensible at nine o'clock; unconscious, and worse, at eleven.

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But when the evidence of this witness is closely examined, she mentions no one fact up to the time of making the will, which indicates a mind capable of any exertion, for she admits that she never heard any long conversation with any one,—that he asked a question and was answered, or he was asked a question and answered it, or he asked for what he wanted, or he answered when he was asked whether he wanted anything,—and she afterwards adds, the questions he asked were simple, and in general had reference to his wants, or his health. She further mentions his recognition of Hutchence, but gives no instance of anything being said by the deceased before he signed the paper *in question, that indicated any intention on his part to make a will, or a state of mind capable of entertaining any question of business. She does indeed, in her answer to the eighteenth article, state an expression made use of by Mr. Baker, after the supposed will was made, which, if true, shows that Mr. Baker was fully conscious at that time of her claims upon his wife, and that Mrs. Baker would, after his death, have the means of providing for her; but there is nothing in the expression, "Ah, Marian, your aunt will provide for you," that necessarily implies his consciousness, that he had given all his property to his wife.

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Other witnesses were examined by the appellant for the purpose of proving the state of Mr. Baker's mind during his last illness; their evidence, however, is of comparatively light importance. Mrs. House only saw him once, and though she says that he was capable of attending to business properly, if necessary, there is no fact spoken of by her that shows any reasonable foundation for that belief, and though she states that he was not in a torpid state of mind or body when she saw him, she admits that neither she, nor any one else in her presence, had any conversation with him, and she states no facts that would prove him to have been in

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a different state from that in which the medical attendants saw him; and their opinion is in direct opposition to her's.

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Samuel House, her husband, was also examined: he saw Mr. Baker on the Saturday night and Sunday afternoon before his death, and, according to his account, Mr. Baker's mind was as collected as possible, and he was as capable of doing any act requiring judgment and reflection as any sick man could be, and *that he seemed to understand every thing that passed—that his mind was as right as that of the witness, and, but for his weakness, he was quite as capable of business. But this witness appears to have formed his opinion upon very slender grounds; for in his examination in chief, the only facts he states are, that the deceased knew him—and that in the course of the six hours which were spent by him in Mr. Baker's presence, the only observations specified are, that on the Saturday while he was being cupped, he talked about it when he was asked if it hurt him; that he recommended the witness to go home for fear he should make himself ill again; so far showing recollection of the fact that the witness had been recently ill: and that on the Sunday, when Hutchence and Severne called, Mr. Baker knew them both, and inquired of them how they were, as any other person would have done. And in Mr. House's answer to the fourth interrogatory, he admits that there was no conversation with him, or any other person, on those occasions, further than his asking or answering simple questions, and his saying he would, or would not, have what was offered to him.

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Any opinion, therefore, of Mr. Baker's capacity for business, built upon such a slight foundation, could carry but little weight when contrasted with the evidence of the medical attendants; and in one particular he is contradicted by Severne and Hutchence, who both state, that to the best of their recollection, when they saw Mr. Baker on the Sunday, Mr. Baker did not speak a word to either of them. Hutchence says he thinks he knew neither of them—and that, in his judgment, he was not capable of doing any act requiring thought, judgment, or reflection; and Severne, *though he thinks Mr. Baker recognized him, said he appeared to him in a very helpless state, and incapable of either bodily or mental exertion.

William Chillingworth, a wine merchant, also saw the deceased once during his last illness, one or two days before his death, and says, "So far as he spoke on the occasion I saw him, he was

sensible, and showed that he possessed his memory;" but he adds, "I was so short a time with him, that I could not judge how far he was capable of an act requiring thought, judgment, and reflection;" and when the particulars of the single interview of which he speaks are looked to, it is manifest that he had no sufficient opportunity of forming any conclusion upon the testable capacity of the deceased: when he went into his room, he admits that Mr. Baker was either asleep or in a state of lethargy; and when Mrs. Baker called to him, and said, here is Mr. Chillingworth come to see you, he appears to have taken no notice of her; but upon her repeating it, he turned and said, "I don't want any of that Madeira now;" and Chillingworth fairly enough draws from this observation, which was the only one he heard Mr. Baker make, that Mr. Baker recognized him, and had a recollection of what had passed between them on a former occasion, because he says, that when they had last met, Mr. Baker had spoken to him about some Madeira, and had said he would take some of it if it was very fine; but though Chillingworth adds in his answers on interrogatories, that Mr. Baker, though feeble in mind and body, was not incapable of mental exertion, and that it appeared to him he was quite capable of conversation if he had been inclined to it, little importance can be attached to an opinion formed upon such insufficient grounds.

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Upon a revision of the whole of the evidence, their Lordships fully concur in the view which the learned Judge of the Prerogative Court has taken of the general evidence of the deceased's state of mind before the execution of the disputed will, and their Lordships further agree with the learned Judge in thinking, that, under such circumstances, the evidence of those who attest the capacity of the deceased at the time of the execution, requires to be watched with great caution and jealousy.

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Keeping, therefore, in mind the principle, that in all cases, the party propounding the will is bound to prove, to the satisfaction of the Court, that the paper in question does contain the last will and testament of the deceased, and that this obligation is more especially cast upon him, when the evidence in the case shows that the mind of the testator was generally, about the time of its execution, incompetent to the exertion required for such a purpose; and further keeping in mind that the disposition in question was not in accordance with any purpose deliberately formed before his mind became enfeebled by disease,—we come to the examination of

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the witnesses, whose evidence is relied on as proving, that at the time of executing the will in question he was fully competent to form, and did deliberately form, the intention of leaving to his wife the whole of his property.

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The first account that we have of any intention entertained by Mr. Baker, after his attack, to make any testamentary disposition, is given by Smith, whose account of Mr. Baker's general state during his illness is so inconsistent with that of the medical attendants, and whose recollection of facts that occurred at that time is so imperfect, that it is impossible to rest with *any confidence on the statements which he makes; but his account of the transaction, as far as it can be made out from a very confused and unsatisfactory statement, in substance is this, that having been acquainted with Mr. and Mrs. Baker for many years, and having come up to town upon some private business during the time of Mr. Baker's illness, he called at his house, and there learned, from Mrs. Baker, that her husband was ill in bed. That at Mrs. Baker's request he went up to Mr. Baker's bed-room, and had some conversation with him—in the course of which, however, no allusion was made by Mr. Baker to any wish on his part to make any will. That at some time after this visit, without any previous allusion by Mr. Baker to the subject, Mrs. Baker requested the witness to go to Salisbury, to inquire of Mr. Tanner, Mr. Baker's solicitor, whether Mr. Baker had made a will. That he went accordingly, and made inquiry of Mr. Tanner, who gave him a draft of a will, not signed, which he brought up to town, and gave to Mrs. Baker, who paid him his expenses. That on his return, he found Mr. Baker very ill, and at Mrs. Baker's request remained in the house. He admits, that after his return he never mentioned to Mr. Baker that he had been down to see Tanner, and that no allusion was made by Baker to the subject of his will, or to any intention of making one; but he says, that some days after his return, the nurse came down and said, Mr. Baker wanted an attorney to make his will, and that upon her mentioning the name of Mr. Knight, the nurse was ordered to fetch him. That Mr. Knight, who at that time was a perfect stranger to the witness, and also to Mr. Baker, came soon after—and that the witness accompanied Mr. Knight up to Mr. Baker's *bed-room. Smith then proceeds to detail the circumstances under which the will in question was drawn and executed; but as his account does not vary substantially from that given by Knight, and as Knight's

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testimony is not open to many objections that have been fairly pressed against the accuracy of Smith's statements, we will take the history of the circumstances under which the will was made, from the deposition of Knight.

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But before we proceed to examine his evidence, it will be right to ascertain the degree of credit that ought to be given to his testimony: and this becomes the more necessary, because his veracity has been brought into question by opposing testimony; has been much assailed by the counsel for the respondent, and has not, in the opinion of their Lordships, been sufficiently appreciated by the learned Judge in the Court below. Knight appears to have been a solicitor living in the neighbourhood of Baker's residence, unknown, at the time, either to Mr. or Mrs. Baker, with no previous bias, therefore, that could be supposed to influence him in aiding Mrs. Baker in any plan to procure, by undue means, the execution of a will in her favour; neither is there anything in the case to show that Knight had any motive for giving an untrue account of the transaction; and although an attempt has been made by the appellant to impeach the testimony of Knight, by the proof of subsequent declarations, manifesting a consciousness on his part that the will had been improperly made, their Lordships are not inclined to give much weight to the testimony by which these declarations are supposed to be proved, which Knight most positively denies.

The principal witness in support of these declarations is John Harris Flocks, a surveyor near Wilton, in Wiltshire. He states himself to have been a confidential friend of Mr. Baker, from whom he had learnt his intention to leave his property amongst his relations, and an annuity only to his wife. That he had some conversation with Mrs. Baker after her husband's death, upon the subject of his will, and that at his request Knight was sent for—and that upon his arrival the witness repeated to Mrs. Baker, in Knight's presence, what he had before told her, that it was a false will, and explained to Knight what Mr. Baker had told the witness about his instructions. Knight, he adds, was very silent while he remained, and very shy of saying anything at all; he heard all the conversation; and when Mrs. Baker asked me whether she should make a will according to Mr. Baker's intentions, or rather said, she would do so, Mr. Knight, I recollect, nodded his head, as approving of it.

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Now, although at this interview Knight is not alleged to have

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made any direct declarations indicative of any consciousness that Mr. Baker's will had been unfairly obtained, it is obviously insinuated that his shyness, and ready assent to Mrs. Baker's proposal to make a will, in order to carry out her husband's intention, sprung out of the consciousness that all was not right : and some weight appears to have been given to this part of Flooks' evidence by the learned Judge of the Court below, who comments upon the absence of any denial by Knight of his having been present at this interview ; but the fact appears to have been overlooked, that although by the tenth interrogatory, administered by Maria Baker, Knight is asked if Mrs. Harwood, formerly Baker, had not admitted, in the presence of Mr. J. Yeates, that she knew that *the pretended will was not good for anything ; and also whether he, William Knight, had not declared to Flooks, that if a bill was filed in Chancery, the said pretended will was not worth a farthing ; and although by the fourteenth article of the first allegation given on behalf of Maria Baker, it is pleaded, that the said William Knight, in June, 1834, declared and admitted to the said John Harris Flooks, in the presence of E. Nightingale, when talking with him on the subject of the said pretended will, that if a bill were to be filed in Chancery, or a stir to be made about it, the said will would not be worth a farthing, or to that or the like effect,—yet there is no interrogatory or allegation pointed to the interview between Mrs. Baker, Mr. Flooks, and Mr. Knight, now under discussion ; the reason for Knight's silence upon the subject is, therefore, obvious : he had no means of knowing that it was alleged, and the fact of this interview rests entirely upon the evidence of Flooks.

In his evidence on the fourteenth article just alluded to, Flooks states the circumstances of his interview with Knight in June, 1834, and swears that upon that occasion, Knight said that the will was a bad business,—that if a bill in Chancery was filed, or the Baker family to make a stir about it, the whole would be upset, and the will would not be worth twopence,—that he said the same thing in different ways two or three times, and said it in a confident way, to assure me he was right,—that Mr. Nightingale, a young man in his employ, was present, though he adds that he does not suppose that he heard all that was said.

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Nightingale is also examined to the same fact, and he says, that he remembers Knight saying, that if the family made a stir about Mr. Baker's will, he did not *think it would stand good. He admits,

however, that he did not know what led to the observation, and that he did not pay particular attention to the conversation, for that he was in conversation with Mrs. Knight.

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Knight is examined to this fact upon the tenth interrogatory, and he denies, in the language of that interrogatory, that he ever declared to Flooks, that if a bill was filed in Chancery, the will in question was not worth a farthing, nor anything to that effect; and he adds, I never said a syllable that could be so understood: I deny the suggestion *in toto*, and the man who suggested it must be base and wicked. He does not indeed, in express terms, deny the words sworn to by Nightingale, because they were not suggested by the question, but the general denial would exclude all such words, and, therefore, we have Knight brought in direct contradiction to Flooks and Nightingale. The evidence, however, of the latter, cannot be much relied on, because the import of the words which he deposes to might be very much varied by the context, which he admits that he did not attend to, and does not pretend to recollect.

It becomes necessary, therefore, to contrast the credit of the two principal witnesses, Knight and Flooks; and when their Lordships look to the conduct of Flooks, in relation to the will of Mrs. Baker, and the manner in which he attempts in his examination on the seventh article to represent that Mr. Hatt, who drew up Mrs. Baker's will from the instructions given to Flooks, was an attorney, or at least had been introduced to him as such, though in his answer to the thirty-second interrogatory, he admits that he did not understand that Hatt was a solicitor, but that he was in a solicitor's office,—yet he further admits that he *spoke of him to Crop as a solicitor, and then attempts to account for his conduct by representing that he had applied to the landlord to recommend him a lawyer, and that Hatt came to him; and yet is again forced to admit, that he asked the landlord if he knew any person who could write out some law papers, and that he did not want a lawyer exactly, but some person who was accustomed to law matters, and that was the way Hatt came to be sent for: and when, upon the examination of Hatt, it appears, that instead of requiring him to draw up a formal will from the instructions prepared by Flooks, he, Hatt, was only desired to copy a will already prepared by Flooks himself, and was not allowed to make any alterations, though informally drawn. When it is found that the will itself gives to the witness Flooks the greater part of the property to his own use

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and benefit, though he represents it to have been so made for the purpose of enabling him to carry out Mr. Baker's intentions towards his own family, their Lordships are not disposed to place much confidence in the testimony of this witness, and cannot, therefore, consider the veracity of Knight in any way impeached by the contradiction opposed to him.

Their Lordships, therefore, think it due to Knight, and to the appellant in this cause, to decide the question of the validity of the will, upon the assumption that all that Knight has stated of the manner in which the instructions were given, and the will itself was executed, is accurately true. Knight's account then is this : that having been sent for to make Mr. Baker's will, as already stated, he went upstairs into Mr. Baker's bed-room, having received no previous instructions from Mrs. Baker, Smith, or anyone else, upon *the subject—without indeed having seen Mrs. Baker or Mr. Smith,—that he found Mr. Baker ill in bed,—that there were with him Mr. Smith, whom he had not previously known, Sophia Reader, Mr. Baker's servant, and Sarah Taylor, the nurse. Mrs. Baker was not present. Mr. Knight then says, "I sat down by his bedside, and in effect said, that I understood that he had sent for me to make his will: he said, 'Yes.' I then asked him whether he had made up his mind as to what his intentions or wishes were; and his reply was, that he had, and intended to give everything to his wife: he said that such was his will, to give everything to his wife, not doubting that she would take care of her niece Marian, or some such name he called her by. I suggested (says Mr. Knight) that he had friends, or some friends; but he said he had made up his mind to leave everything to his wife; still, however, saying, that he trusted she would take care of her niece. I think I suggested to him, he should say who was to be his executor, and he said, 'My wife, she is to be sole executrix.' That was the whole of the instructions I received. Mr. Smith was close by me, or nearly close by me, the whole of the time, and must have heard, as indeed every person must have heard, all that passed." He adds, "No person interfered in giving me the instructions; the whole came from Mr. Baker's own lips: it was done in no haste. There was I believe some general conversation beside, between Mr. Smith and Mr. Baker, but to which I paid no attention; and after about ten minutes or a quarter of an hour, having had no occasion to make any minute of such very simple instructions, I asked for paper and writing materials, and sat down

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at a table in the room close to the bed, and wrote *the will out fair for execution. I needed no further instructions. I had nothing to do but to use words sufficiently comprehensive to apply to property of every description. I made no inquiry as to what Mr. Baker's property consisted of: he did not tell me what it did consist of in giving me instructions. He mentioned his wife's Christian name, Mary Ann, I think; and in writing the will out, I had not any occasion to ask him for further instructions for my guidance. After I had written the will completely out, and fair for execution, I took it to the bedside and read it carefully, and slowly, and distinctly, to Mr. Baker, and he said it was quite right, or to that effect; and then I desired to have pen and ink brought to me, that he might sign it, and I think Mr. Smith brought them to me, and then Mr. Baker tried to sign his name, and could not. He tried many times, but could not; and not being able to write his name, I said, Well, Mr. Baker, you must make your mark; he, therefore, accordingly made his mark, and sealed and delivered the will in the usual way. I prepared the will with the seal, and I gave him the words of publication, and he repeated the words, 'I publish,' &c., 'and request you to sign my will;' and then I signed my name, and Smith his, and the servant Reader, her's. When the execution of the will was quite completed, I sealed it up in an envelope, and then delivered it to Smith: I never saw Mr. Baker afterwards." He afterwards adds, "Mr. Pollock, the medical gentleman, came in before I left, and I was pleased that he did, for Mr. Baker alluded to the will he had made, to Mr. Pollock; he said in answer to Mr. Pollock's inquiry as to how he felt himself, that he was easier, and when Mr. Pollock said that he understood he had *been settling his affairs, he said that he was glad that he had."

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Taking the facts thus deposed to by Knight as substantially correct, and admitting that Knight (who knew nothing of Mr. Baker's previous intentions, or of the state of stupor in which he had generally been found by his medical attendants) might fairly come to the conclusion, which he says he drew from what he saw of Mr. Baker, namely, that he was perfectly capable of giving instructions for his will, and of making it, and of doing any act requiring thought, judgment and reflection, it by no means follows that Knight's conclusion is sound, when all the other circumstances of the case not known to Knight are taken into account. If Knight had known of the usual state of Mr. Baker's mind since the commencement of his illness, he would probably have taken more

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pains to ascertain the extent of his recollection and of the powers of his mind, before he acted upon the general instructions for his will. If he had known of the instructions for former wills, he would doubtless have questioned him about them, and might have been able, from Mr. Baker's answers, to form an accurate estimate of the capacity of his mind to make a disposition of his property so inconsistent with his former views; but the circumstance of Knight being a total stranger to Mr. Baker and to his family, leaves the case without any clue by which the Court can judge that Mr. Baker had at the time any recollection of the relations for whom it is clear he at one time intended to make a provision, or of the fact that he had ever given instructions for any other will,—and there is not the slightest evidence of any former declaration by the testator, that he *intended making a will in accordance with the instructions afterwards given to Knight; on the contrary, there is evidence that before his illness Mrs. Baker had suggested such a disposition to Mr. Baker, but he had answered that she was not capable of taking care of anything, but that she would have enough for herself; that there was his own family to think of; and no expression indicating any change of intention is spoken of by any witness in the suit. Smith indeed supports the inference drawn by Knight, and Smith had had earlier opportunities of observing the conduct of Mr. Baker and of judging of his capacity; but their Lordships are not disposed to place much reliance on the testimony of this witness, for, by his own evidence, his memory appears to be infirm, and his account is throughout confused, and proved to be inaccurate in many points by the testimony of Tanner; and the circumstances that he had gone down to Salisbury by Mrs. Baker's desire to inquire about Mr. Baker's will,—that he had ascertained the existence of a draft will, so materially differing from the instructions given to Knight in his presence,—and the fact that he nevertheless did not suggest either to Mr. Baker or to Knight either the existence of such a document, or the fact of his having been down to Salisbury to inquire for it,—lead most forcibly to one of two conclusions, either that Smith was afraid to remind Mr. Baker of his former intentions, lest he should adhere to them, or that he felt that his mind was too feeble to comprehend so complex an arrangement of his affairs.

But there is another and more important objection to Smith's testimony. According to Tanner's evidence, he, in September or October, prepared the draft *of a will for Mr. Baker from his own instructions; that by the directions of Mr. Baker, that draft

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will, when completed, was in October, 1831, sent by Tanner to the care of Mr. Hutchence of Coleman Street, London; that at the time it was so sent to Mr. Hutchence, he believes no part of the paper was torn off.

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Mr. Hutchence says that about the latter end of 1831, a parcel was left at his warehouse in Coleman Street, to be under his care for Mr. Baker; that it remained under his charge some days, when Mr. Baker called and took it away, thanking him for his care of it, and saying it was his will from Tanner.

This draft will is produced as the script marked D, by Mr. Harwood, and when produced, the last and back sheet are torn off—just below the date, which is left partly in blank, taking away that part of the paper on which the signature, or any attempt at a signature, by the deceased would have appeared if the will had been executed, or if any attempt to execute it had been made by the deceased. Now Smith swears that when he went down to Salisbury to make inquiries of Tanner about Mr. Baker's will, that Tanner gave him a draft will, not signed, which he brought back and gave to Mrs. Baker, and that the script D was the draft will, which he so received from Tanner. Tanner, on the other hand, not only swears, as already stated, that he had sent the script D to Hutchence in October, 1831, but most positively asserts that he did not deliver to him any packet when he called upon him about the will; and then Smith, who is again examined upon the second allegation on behalf of Harwood, though he perseveres in saying that according to his recollection, he could swear that Tanner gave him the draft, and that he returned it to Mr. Baker, admits *that, as Tanner swears to the contrary, he may be mistaken, and lowers his confidence down to *almost* swearing that he did give him the draft. Now this is a fact so much connected with the whole object of his journey to Salisbury, that it is impossible to look at this part of Smith's testimony without seeing that there must be a great defect, either in his recollection or in his veracity. There is another point, and one more immediately connected with the question of Mr. Baker's capacity, which, if it had been satisfactorily proved, would have shown that Smith is totally unworthy of the slightest credit. Sanders Trotman, a hairdresser, states that he was employed to shave Mr. Baker on the morning of his death, and that while there, an elderly gentleman, whose name he did not know, and whom he cannot identify as Smith, placed a paper, which the witness believes, on its being shown to him, to have been

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the script D, but which was not then torn at the bottom, before Mr. Baker, and asked him to sign it; that Mr. Baker tried to write and could not—he seemed to be running the pen down the paper instead of across it, and did not seem to have any idea what he was doing, and so the gentleman took the paper away.

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The only persons who, according to this witness's statement, were present, were Sophia Reader, and the nurse Taylor; but inasmuch as by the common consent, the testimony of these witnesses cannot be relied on in respect of the main question of Mr. Baker's capacity, and the *factum* of the will, it would be unsafe to resort to their evidence for the purpose of proving that Smith was the elderly person who placed this paper before Mr. Baker for his signature, and the only other evidence tending to connect Smith with the *transaction spoken to by Trotman, is the evidence of Mr. Pollock, who says that either on the day of Mr. Baker's death, or the day before, but he thinks the day before, Smith showed him a paper, purporting to have been signed by Mr. Baker, as Mr. Baker's will; but Smith, though charged with having presented the script D to Mr. Baker for his signature, which he most positively and pointedly denies, is not asked whether he had not shown Pollock a paper, which he said was Mr. Baker's will, neither is he asked whether he had not told Tanner that Mr. Baker had attempted to sign the draft will, but had blotted and blurred it so that it was of no use, so as to bring the evidence of these two witnesses into direct contradiction upon this point; and therefore though Trotman's evidence may be taken, as showing the state of Mr. Baker's mind on the morning of the day when the disputed will was executed, neither his evidence nor that of Pollock or Tanner can be taken as directly impeaching the credit of Smith, still less can the evidence of the two latter witnesses be taken, as proving the fact that the draft will had been presented to the deceased for execution; there still remains, however, the discrepancy between Smith's evidence and that of Tanner, as to the delivery of the draft will to Smith, which sufficiently proves that Smith's accuracy cannot be relied on, whatever may be the value of his character for veracity.

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The only other witness who speaks of the state of Mr. Baker's mind at that period of his illness at which the will was executed, upon whose testimony their Lordships can place any reliance, is Pollock, who, as already observed, was at that time assistant to Mr. Carrick, and in that character attended Mr. Baker in *his last

illness. He saw Mr. Baker repeatedly during his last illness, but was not aware, from himself, of his intention to make his will, or of his making his will, till the very day he died.

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It appears by Pollock's evidence, that, about seven o'clock of the evening of Mr. Baker's death, a message was brought to Mr. Carrick's, for either Mr. Carrick or Mr. Pollock to go to Mr. Baker's house, about his will. That Pollock went immediately, and saw Mrs. Baker, who asked him to go up to Mr. Baker, as they were making his will. That on his going into Mr. Baker's bed-room, he saw Knight engaged with some papers, as he presumed, on the will. Smith was also present. Pollock went to Mr. Baker's bedside, and felt his pulse, and asked some medical questions, which he answered as usual. "And then," Pollock adds, "thinking my attendance had been required with reference to the will which was making, I put some questions to him upon the subject. I first remarked to him, 'You are engaged just now, are you not?' He said, 'Yes, I am.' I then said, 'Then it was not done before?' He replied, 'No, not satisfactorily.' I then said, 'Your mind will be easier when it is done.' He answered, 'Yes, a great deal.' This was all that passed." From this conversation, and from what he had previously observed, Pollock draws the conclusion that Mr. Baker understood the questions put to him, and the answers he made to them; and that he was competent to the understanding a simple disposition of his property; but he adds what, in their Lordships' view of the question before them, is of great importance—that "he would not have been equal to the understanding of a complicated will; but a mere simple disposition of his property, where there *was to be no comparison or weighing of the claims of relations upon him, I think he was equal to." He goes on to say, "I had some doubts before, from the nature of his illness, his dull lethargic state, answering questions when roused, but relapsing again into a state of lethargy, whether he was capable of making a will, but—my doubts being in his favour—there was always a dull, heavy state of mind to induce me to be cautious in forming and expressing an opinion as to his capacity; he required rousing, but always answered my questions to the point; and I think he was capable of giving instructions for and making a will of a simple nature. I don't think, from the state he was in, that the idea of making his will could probably originate with him, but, if asked the question, I think he would have answered correctly, whether he would or would not make it; and, if asked who he would leave

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his property to, he would have correctly stated who he wished to leave it to. There was no delusion ; it was a heavy, clouded state of mind, from which he required to be roused to answer questions ; but, when roused, he answered those questions correctly." And, in answer to the sixteenth interrogatory, Pollock further says, " I was not asked by Mr. Baker, or any person, to be a witness to his will. If I had been asked to witness the will, I should have hesitated about it, without further investigation ; but, at the same time, if I had heard it read to him, and been satisfied with the manner in which Mr. Baker conducted himself, and heard the matter, I should have witnessed it without difficulty : the whole would have depended upon circumstances. I cannot now say whether I would or would not have witnessed the will without questioning Mr. Baker further. [*313] I can't say whether the idea of making *the will did or did not originate with Mr. Baker, but I have no reason to believe or suspect that it was unfairly or unduly obtained."

Taking the whole of this gentleman's testimony together, it does not appear very materially to differ from that of Carrick and Hawkins : he seems, indeed, to have entertained doubts more favourable to the capacity of Mr. Baker to make a will ; but he nevertheless concurs with Hawkins that he was capable of making a short will ; or, as Mr. Pollock expresses it, " a simple will ; " and with Carrick, that he might understand a simple matter placed before him ; but he also concurs with Carrick in thinking that he was incapable of understanding what was complex, and Pollock explains what he considers a simple will, as one that would require no comparison or weighing of the claims of relations upon him.

Now if their Lordships had found from the other evidence that Mr. Baker had, while in a state of health, compared and weighed the claims of his relations, and had formed the deliberate purpose of rejecting them all in favour of his wife, but had omitted to carry that purpose into effect before the attack of illness under which he died ; and that during that illness he had acted upon that previous intention, and executed the will in question,—less evidence of the capacity to weigh those claims during his illness might have been sufficient to show that the will propounded really did contain the expression of the mind and will of the deceased. But when their Lordships find, that up to the date of his illness he had entertained a deliberate purpose of distributing a large portion of his property [*314] amongst his relations ; and that he had never before *the hour in which he gave the instructions for the disputed will, expressed any

intention to leave his property to his wife; and when their Lordships further find (as they cannot but believe to have been the case), that during his illness he had attempted to execute a draft of a will, containing a disposition of a large portion of his property amongst his relatives—to which, it is probable the deceased referred, when he remarked to Pollock that his will had not been done satisfactorily before—their Lordships are of opinion that the appellant has not made out by his evidence that the paper propounded by him as the will of Mr. Baker really does contain his last will and testament.

Their Lordships, therefore, will advise her Majesty to affirm the judgment of the Court below, and to

Dismiss this appeal, with costs.

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ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY (1).

JOHN BROOKE v. EDMUND KENT (2).

(3 Moore, P. C. 334—350; reversing S. C. nom. *In the goods of W. Brooke*, 2 Curt. 343.)

1840.
Dec. 21.
1841.
July 1.

Obliterations and alterations made subsequent to the 1st of January, 1838, in a will of previous date, are within the provisions of 1 Vict. c. 26, and to be effectual must be executed with the solemnities required by that statute.

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To render such obliterations or alterations a revocation of the will, there must be an intention on the part of the testator to revoke, which if not manifest from the due execution of the obliterations and alterations, can only be ascertained by the rules of evidence applied in similar cases under the Statute of Frauds.

Probate of a will so circumstanced, decreed in its original form, the obliterations and alterations not being executed in conformity with 1 Vict. c. 26, and it being apparent that the testator intended only a substitution, and not a revocation of the bequests altered.

THE question in this case arose under the Act 1 Vict. c. 26, for the amendment of the laws in respect to wills, as to the validity of certain alterations made by the testator in his will subsequently to the period when the above Act came into operation; namely, the 1st of January, 1838.

The testator, William Brooke, by his will, bearing date the 15th day of July, 1837, which was then duly executed and attested, amongst other things, empowered each of the several persons

(1) Present: Lord Brougham, Lord Denman, Mr. Justice Bosanquet, and the Right Hon. Dr. Lushington.

(2) Cited by Sir J. HANNEN, *In the goods of McCabe* (1873) L. R. 3 P. & D. 94, 96.

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successively named, tenants for life of his manors and freehold hereditaments, thereby devised, to appoint, to the use of any woman with whom he might intermarry, for the life of such woman respectively, by way of jointure, an annual sum or rent-charge, not exceeding, in the whole, the sum of two hundred pounds, with a proviso that *his estates should not, under the power, be at any one time subject to the payment of more than the annual sum of four hundred pounds for jointures; so that if by the exercise of such powers, his estates should at any time be charged with a greater sum for jointures, in the whole, than the sum of four hundred pounds, the payment of the sums occasioning such excess should, during the period of such excess, be suspended.

The testator afterwards altered the amount of the annual jointure so made chargeable on his estates, from two hundred pounds to one hundred pounds, by erasing with a knife the word "two" in his will, and writing the word "one" in its place; and he also altered the amount of the sum to which the jointures, together, were to be limited, from "four" hundred pounds to "two" hundred pounds, by erasing, in like manner, part of the word "four," and converting the same into the word "two," in his will; and, in reference to such alterations, he wrote and subscribed with his name, at the end of his will, the following memorandum:

"The erasure in the twenty-third line of the sixth sheet, the word 'two' taken out, and the word 'one' put in its place; and, in the first line of the seventh sheet, the word 'four' taken out, and the word 'two' put in its place; and in the fifth line of the seventh sheet, the word 'four' taken out, and the word 'two' put in its place.

"By me,

"W^m. BROOKE,

"June 26th, 1838."

The words in the will for which the words "one" and "two," respectively, were substituted, were too completely effaced to be legible.

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Under these circumstances, on the 24th of January, 1840, an allegation, propounding the will in its original state, was tendered, on the part of the present appellant, one of the executors, in the Prerogative Court.

The allegation pleaded, that on the 26th of June, 1838, the testator, with a knife, erased the amount of annual jointure, and

altered the same from 200*l.* to 100*l.*, writing under the clause of attestation, at the end of the will, a memorandum of what the alterations were, and signing the same: but that they were not written or signed in the presence of two witnesses—and by reason thereof were invalid and of no effect in law.

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On the 18th of February, 1840, the Judge (Sir HERBERT JENNER) rejected the allegation, and refused probate to the will in that state, on the ground that the memorandum, being unattested, formed no part of the will of the deceased; and that it could not be looked at to show what the words were which had been erased (1).

The rejection of this allegation was the ground of the present appeal.

In order to raise the question at issue, namely, as to the form in which the probate of the will should pass, under the circumstances, an allegation was tendered, after the admission of the appeal, on behalf of the respondent, the other executor named in the will of the testator, propounding the will in its present or altered state.

The *Queen's Advocate* (Sir John Dodson), and Sir William Follett, Q. C., for the appellant.

* * * * *

Dr. Addams and *Mr. Toller*, for the respondent.

* * * * *

The case stood over for consideration, when judgment was delivered by

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THE RIGHT HON. DR. LUSHINGTON:

Mr. Brooke executed his will in the presence of three witnesses, whereby he disposed both of real and personal estate. The execution of the will took place on the 15th of July, 1837. The testator died towards the end of 1839.

1841.
July 1.

The will, when found upon his death, was not in the same state as when executed. In the clause of the will which enabled the tenants for life successively of several freehold estates to settle jointures upon their wives, there was a manifest alteration. Upon the face of the will, upon inspection only, without reference to other documents or proofs, it appeared that the annual amount of jointure, whatever might have been originally inserted in the will, was so obliterated that such amount could not be ascertained by

(1) Reported *nom.* In the goods of William Brooke, deceased, 2 Curt. Ecc. Rep. 343.

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inspection; but upon the sum obliterated was written "one," making the amount of jointure one hundred pounds per annum. In a *subsequent part of the same clause, which clause limited the amount of jointure to be charged on the estate, at one and the same time, there seems two erasures of the original amounts in two different places, and the word "two" in each was written on the obliterated parts, and the obliterations were complete in both these cases, so that by inspection the original sums could not be discovered. By the words inserted, therefore, the amount to be charged by way of jointure could not exceed two hundred pounds per annum.

It was further pleaded that these alterations were made by the testator on the 26th of June, 1838, with his own hand. That the sums now altered to "one" and "two," originally stood "two" and "four."

At the conclusion of the will, after the signatures of the subscribing witnesses, was a memorandum to the following effect:

"The erasures in the twenty-third line of the sixth sheet, the word 'two' taken out and the word 'one' put in its place, and in the first line of the seventh sheet, the word 'four' taken out and the word 'two' put in its place, and in the fifth line of the seventh sheet, the word 'four' taken out and the word 'two' put in its place.

"By me,

"W^m. BROOKE,

"June the twenty-sixth, one thousand eight hundred and thirty-eight."

This memorandum was pleaded to be in the handwriting of the testator. The draft of the will was also pleaded, whereby the original amounts appeared to be as stated in the memorandum.

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These facts were pleaded in the Prerogative Court by John Brooke, one of the executors, and he prayed probate of the will in its "original" state.

This was the only allegation given in, in the Court below. The Judge rejected that allegation, and also refused the prayer of Mr. Kent, the other executor, that probate should pass in the "altered" state. The Judge was of opinion that probate ought to pass "in blank," where the sums had been obliterated and other sums written on the obliterations.

Mr. John Brooke having appealed the cause, Mr. Kent gave in an allegation; but that allegation only pleaded certain of the facts

before pleaded, and that the law was not as alleged on behalf of Mr. Brooke: on the contrary, that allegation averred that the will, having been originally executed prior to the 1st day of January, 1838, the alterations were valid and effectual; meaning thereby that the will, together with the alterations, was wholly without the statute passed in 1837.

The Act for the amendment of the law with respect to wills passed on the 3rd of July in that year, but by the 34th section there is a provision as to its operation on wills made before the 1st of January, 1838, which must be considered hereafter.

It may be expedient to consider what the Court of Probate ought to have done, had this case occurred prior to the passing of this statute; in what shape probate would then have been decreed to pass. It must be recollected, that though the will contains bequests of personalty as well as devises of land, yet that this clause, both as it stood originally and as altered, related to freehold exclusively; that the Court of Probate has no jurisdiction over devises of freehold; *and that the probate is not evidence with respect thereto.

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If the Court of Probate had applied to such circumstances the law as laid down in various cases, it would have restored the will to its original state; for it is quite clear that the obliteration was made only with a view to give effect to the intended substitution, and such substitution failing for want of execution according to the Statute of Frauds, the obliterations and words substituted would not make a revocation, but the will would operate as originally executed.

But it is said that there is no case in which the Court of Probate ever attempted so to deal with a devise of real estate. Indeed, it may be doubted whether any case similar to this ever was the subject of discussion. On the contrary, there can be little doubt but that had this case occurred before the new statute, probate would have passed of the will as altered, together with the memorandum at the foot. Probably the Court of Probate before the statute would have said, that it had no jurisdiction over real estates, and could not judge of devises thereof; that these alterations, coupled with the memorandum at the foot, would have been effectual had the property been personalty (as no doubt they would); and that its probate must be governed by the rules governing wills of personalty only, and probate would have passed of the will as altered, together with the memorandum.

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Now, assuming that the new statute does not at all extend to this will, if the preceding observations are well founded, it would follow that the judgment of the Court below must be reversed, and that the necessary facts being proved or admitted, probate must pass of the will as altered, together with the memorandum. *For in that case the rules applying to the probate of wills of personal estate prior to the statute must take effect.

This leads to the consideration of the statute.

It is desirable first to consider what were the objects of that statute, and the leading principles on which it is framed. The second section repeals all former statutes respecting wills of real and personal estate. The Act then proceeds to prescribe the form in which all wills of realty or personalty shall be executed. It further provides for the revocation of wills in whole and in part, and for the rules to be followed in making alterations, and then are those sections as to the construction.

The object of the statute it seems was, by providing one uniform mode of executing all wills, of whatever description the property might be, and one uniform mode of revocation and alteration, to do away all the anomalies and mischievous distinctions which had prevailed as to property of different kinds.

The statute passed on the 3rd of July, 1837, and would have come into immediate operation had it not been for the 34th section. That section is in these words :

“ That this Act shall not extend to any will made before the 1st day of January, 1838, and that every will re-executed, or re-published, or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-executed, re-published or revived ; and that this Act shall not extend to any estate *pour autre vie* of any person who shall die before the 1st January, 1838.”

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In attempting to discover the true construction of this *section, it cannot be denied that there are difficulties in every view of the case. It is evident that some such provision was absolutely necessary ; otherwise all wills made prior to the passing of the Act would immediately have become subject to its operation, and a very large part would have become null and void. Again, it was necessary that some time should be suffered to elapse to give the people an opportunity of becoming acquainted with the enactments of a statute which affected so very large a proportion of the nation. Again, it might be considered a hardship to compel persons who

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had already disposed of their property by will according to the existing law, or who might do so within so short a period after the passing of the statute as to be in excusable ignorance of its provisions, to incur the trouble of re-publishing their wills according to the new law.

The reasonable time fixed by the Legislature is the 1st of January, 1838; and the question is, whether all wills and codicils made before that date are altogether and for ever out of the operation of the Act, or if not wholly, only in part, and in what part, and for how long. Now it is clear that all wills and codicils made before the 1st of January, 1838, were not altogether and for ever out of the operation of the Act, and to be governed by the old law, for if they were, they might be re-executed according to the old law, or re-published according to the old law, or revived or altered by a codicil executed according to the old law: but this same 34th section provides for the contrary; for every will or codicil, though made before the 1st of January, if re-executed, re-published, or revived by codicil, shall be deemed to bear date at the time it was so re-executed, re-published, or *revived by codicil. Now, if such re-execution, re-publication, or revival by codicil, took place after the 1st of January, 1838, the whole instrument bears date at such time; and, consequently, is out of the exception, and within the Act.

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It seems obvious, therefore, that in these three most important particulars, wills dated before the 1st day of January, 1838, may come within the Act, if re-executed, re-published, or revived by codicil, subsequent to the 1st of January, 1838. A further consequence is this, that after the 1st of January, 1838, no codicil can be made to a will executed before, save according to the statute bringing such will within the statute, for every codicil to a will of personalty is a re-publication, and consequently must be executed according to the Act.

If, then, for the purposes already mentioned, a will dated before the 1st of January, 1838, must be governed by the statute, the next question is, as to alterations made by obliterations, or by the insertion of words in the body of the will; but if such obliterations or alterations are not governed by the statute, then this consequence would follow—that a codicil (of slight importance as might be the case) would fall within the operation of the statute, and be void, because not executed according to the statute; but an alteration in the body of the will by obliteration or the insertion of words, being governed by the old law, might take effect, though affecting or changing the most important dispositions in the will. If such were really the state of the law, it would not be reconcileable with any

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sound principles, and its operation in the present case would be to render void the codicil executed validly, according to the old law, and to leave these obliterations *and alterations to the law, as it stood prior to the passing of the statute. It must always be recollected, that with regard to personalty, the object to be effected by codicil, obliteration, or the insertion of words, is the same, viz., to effect an alteration.

For these reasons, it appears that the obliterations and insertion of the words made in the body of the will, fall under the statute, and so far the judgment of the Court below is well founded.

We have, then, arrived at this point—what does the statute direct to be done in cases of obliteration, interlineation, or alteration? The two sections which require to be considered, are the 20th and the 21st. The 20th section declares “that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil, executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.” It is quite clear from these words, therefore, that an intention to revoke is absolutely necessary to effect a revocation by burning, tearing, or otherwise destroying. By construction, a similar effect was given to the Statute of Frauds, but the words, “with the intention of revoking the same,” are not to be found in that statute.

The 21st section is in the following words :

[*349] “That no obliteration, interlineation, or other alteration, made in any will after the execution thereof, shall be valid, or have any effect, except so *far as the words or the effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner, as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed, if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will, opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will.”

The first point for consideration as to this section is, whether “intention” must not accompany the acts mentioned in it, in the same way as intention must accompany the acts mentioned in the

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20th section : unless this construction be given to the 21st section as must necessarily be applied to the 20th, some very absurd consequences would follow. Burning or tearing a will without intention could not revoke the instrument, or any part; but obliteration without intention might render ineffectual the most important part of it : the Legislature ever could intend that intention should be indispensable to give effect to burning or tearing and not to obliteration with ink, or something similar.

In all those cases under the Statute of Frauds and in this Act, intention is indispensable ; under the former statute, to burn, or to tear, or to obliterate a part of a will, was altogether a nullity, if such act was done *sine animo revocandi*, and only for the purpose of making immediately some new disposition or alteration ; and if, from want of compliance with the statutory regulations, such new disposition or alteration *could not take effect, then the burning, tearing, or obliteration, in no degree revoked the will, but it remained in full force, as if nothing had been done to it. Similar principles must be applied to cases arising under the present statute—there is nothing in the statute which tends to a contrary conclusion.

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Then how is the intention of the testator to be ascertained ? Primarily by the same rules of evidence which have been applied whilst the Statute of Frauds was in force as to wills. The same evidence that was received in *Bibb d. Mole v. Thomas* (1), and *Onions v. Tyrer* (2).

In the present case there is abundance of proof assuming the facts stated in the allegation to be proved. The testator did not intend to revoke absolutely—he meant to revoke by substituting different sums from those originally demised. The alteration cannot take effect because not executed according to the statute ; therefore, in conformity with old-established principles, and a long train of decisions, the revocation is ineffectual, and the will must stand in its original state. The handwriting of the testator, and the paper intended for a codicil, establish all the necessary facts on which to found this conclusion.

Their Lordships are of opinion, therefore, to reverse the decree of the Court below, and admit the allegation given in, in that Court ; and as it has been intimated from the Bar that the facts pleaded in that allegation are admitted on both sides, their Lordships will retain the cause, and decree probate of the will in its original state : the costs of all parties to be paid out of the estate.

(1) 2 W. BL 1043.

(2) 1 P. Wms. 343.

ON APPEAL FROM THE ISLAND OF TRINIDAD (1).

1841.
*Dec. 4, 18.*Lord
BROUGHAM.

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THE RIGHT HON. SIR GEORGE FITZGERALD HILL
v. THOMAS BIGGE AND EDMOND WALLER
RUNDELL (2).

(3 Moore, P. C. 465—483.)

Plea to an action of debt, brought in the Court of First Instance in the island of Trinidad, that the defendant was, at the commencement of the action, and still continued to be, Lieutenant-Governor of the island, and as such not liable to be sued; overruled.

Semle: Though judgment be given against such Governor, his person is not liable to be taken in execution while on service.

THE appellant, the Right Hon. Sir George Fitzgerald Hill, on the 10th of November, 1825, became bound by his writing obligatory to Philip Rundell, John Bridge, Edmond Waller Rundell, and Thomas *Bigge, of the city of London, jewellers, and co-partners, in the sum of 825*l.* 13*s.*, Irish money.

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The appellant, some time after giving the said bond, became Lieutenant-Governor of the island of Trinidad and its dependencies.

On the 24th of June, 1837, the respondents, Thomas Bigge and Edmond Waller Rundell, the surviving partners of Rundell, Bridge & Co., brought their action in the Court of First Instance of Civil Jurisdiction of the island of Trinidad, for the recovery of the above debt.

On the 18th of July, 1837, the appellant came into Court under protest, and pleaded that the said Court ought not to hear or take further cognizance of the action, because, at the time of the commencement of the said action, he was, and still continued, Lieutenant-Governor of the island of Trinidad, and its dependencies, and that he was therefore not liable to be sued in the said Court.

The respondents demurred to the plea, and prayed judgment. The cause was declared contested, and on the 17th of November, 1837, the cause was tried, and the Court, after hearing counsel in support of and against the exception pleaded by the appellant, on the 20th of November, 1837, ordered judgment to be entered up in favour of the respondents against the appellant, for the amount of the debt, with interest, and all costs.

(1) Present: Lord Brougham, Lord Campbell, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

(2) *Luby v. Wodehouse*, 17 Ir. C. L.

R. 618; *Sullivan v. Spencer*, Ir. R. 6 C. L. 173; *Musgrave v. Pulido* (1879) 5 App. Ca. 102, 107.

From this judgment the present appeal was brought.

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Mr. Burge, Q. C., and Dr. Addams, for the appellant :

The appellant being Lieutenant-Governor of the colony, is exempted from being called on for liabilities *in the colony over which he is placed. By the terms of his commission, he is vested with the legislative as well as the executive power (1) ; his exemption cannot, therefore, be merely personal, as from arrest, but is much higher ; he is not within the jurisdiction of the Courts ; they are incompetent to entertain a suit, or to pronounce judgment therein against him.

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This privilege is not one merely of municipal law, but is founded on a higher title, viz., the law of nations. Thus Puffendorf, de Officio Hominis et Civis, says—" If the subject be aggrieved by a sovereign, he cannot maintain an action, or oblige him to redress : he may persuade him if he can." The same position is laid down by Locke in his Essay on Government (2), who observes, " that it is better a private mischief should ensue to an individual, than that the peace and security of Government should be violated by an attack upon the magistrate exercising the power of state ; " and by the law of this country, if redress is sought for an injury committed by the Crown, it must be, if there is any redress, by petition of right (3).

The statute 11 & 12 Will. III. c. 12, made to punish Governors of plantations, for crimes committed by them in such plantations, recites, that a due punishment is not provided for such offences, and that Governors, &c., have taken advantage thereof, " not deeming themselves punishable for the same here, not accountable for their crimes and offences to any person within their respective Governments and commands." Now if there was no jurisdiction against *a Governor in criminal matters, before the statute, à fortiori, none could have existed in civil cases, and the statute is confined to criminal offences only.

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The authority of the Governor of Trinidad is derived from the proclamation of the 19th of June, 1813 (4). By that, all the powers of the executive government within the island are vested solely in the Governor for the time being ; and all such judicial powers as, previous to the surrender of the island, were exercised

(1) Stoke's Brit. Colonies, 150, 154,
188.

(3) 3 Bl. Com. 254—255.

(4) West Ind. Com. Trinidad, App.
p. 176 ; 1 Howard's Col. L. 153.

(2) Part 2, § 205.

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by the Spanish Governors, are to be exercised by the Governor then appointed. This includes the authority and jurisdiction of the Court of Audiencia. By the constitution of the colony under the Spanish Government, the Court of Audiencia had original, civil and criminal jurisdiction over all the inhabitants of the island (1), so that the Governor is, by the proclamation of June, 1813, invested with like power; can arrest, grant, or repeal the writ of *habeas corpus*, try actions, and do all such acts as belong to the supreme authority, acting judicially as well as executively. Now, is this consistent with his being liable to be sued in an action of debt? The doctrine of the inviolability of a Governor is derived from the civil law; it is expressly provided for "In jus vocari non oportet, neque Consulem, neque Prefectum, neque Prætozem, neque Proconsulem, neque cæteros Magistratus, qui imperium habent, qui coercere aliquem possunt, et jubere in carcerem duci" (2); and has been adopted by the Spanish law (3), which is the authority in Trinidad.

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In *Fabrigas v. Mostyn* (4), Lord Ch. J. MANSFIELD, *assigning the grounds of his judgment, says: "Now in this case no other jurisdiction is shown even by way of argument: and it is most certain that if the King's Court cannot hold plea in such a case, there is no other Court upon earth that can do it, for it is truly said that the Governor is in the nature of a Viceroy, and of necessity part of the privileges of the King are communicated to him during the time of his government. No criminal prosecution lies against him, and no civil action will lie against him; because, what would the consequence be? Why, if a civil action lies against him, and a judgment obtained for damages, he might be taken up and put in prison on a *capias*; and therefore locally, during the time of his government, the Courts in the island cannot hold plea against him." That was an action brought in England against a Governor of Minorca for trespass and false imprisonment, and the very circumstance of its being held to lie in the Courts here, clearly shows that it could not be brought in the Courts there—the argument of the LORD CHIEF JUSTICE is conclusive. In *Tandy v. The Earl of Westmoreland* (5), an action was brought against the defendant for an act done by him as Lord Lieutenant of Ireland, and the *subpœna* after solemn argument was quashed.

(1) West Ind. Com. Trinidad, p. 18.

(4) 1 Cowp. 161.

(2) Dig. lib. 2, tit. 4, l. 2.

(5) 27 State Trials, 1246; 20 State

(3) 1 White's Recopulation, 367.

Trials, 229.

The action was brought in Ireland, and the Lord Chief Baron of the Exchequer, Lord FITZGIBBON, was clearly of opinion that no such action lay, and gave judgment accordingly. The point has been expressly decided in Canada in *Harvey v. Lord Aylmer* (1) : there an action of debt was brought against the defendant by a servant, and the claim *being an account of wages, and damages for the non-payment thereof. The defendant pleaded that he was Governor of the province of Lower Canada, and averred that so long as he continued to execute the said office and trust, no suit nor action could be had or maintained against him in any of his Majesty's Courts with the province, for any matter or thing whatsoever ; and the Court allowed the exception, and dismissed the action, the Chief Justice SEWELL observing that there was no room to doubt the validity of the exception which had been filed. The Court were of opinion that the case of *Fabrigas v. Mostyn* was alone sufficient to determine the question, but they cited all the authorities, and stated two cases of a similar nature, which had already been decided in the Upper Province of the country. The inconvenience of the rule forms no argument against it : the subject cannot be said to be without remedy, for he may petition for the Governor's removal, and the Crown might put him on terms to do justice if it thought fit—the inconvenience is only similar to the case here of the will of the Sovereign ; there is no law prohibiting the King from making a testamentary disposition of his property, but there is no Court capable of administering such property, or of granting probate of such a will ; that is a practical hardship both upon the Sovereign and the parties who would be beneficially entitled (2).

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Mr. Erle, Q. C., and *Mr. Merivale*, for the respondents :

The proposition contended for by the appellant cannot be supported on principles either of law or *justice. It is neither consistent with the law of England or the law of Spain, which is in some measure the rule by which this case must be governed. The protection sought, would give impunity to every Governor of a colony for any act committed by him in the colony over which he is set ; and release him from every contract or civil obligation. This exemption from the responsibilities of an ordinary citizen is founded on a supposed identity of the office of Governor and that of Sovereign. But the privilege claimed would be even then too

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(1) 1 Stuart, Rep. of Cases in the (2) 1 Add. Ecc. Reps. 255.
K. B. in Lower Canada, 542.

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high, for the Sovereign has no such extravagant prerogative, and there is no real analogy between the two offices.

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The authority of a Governor is derived from the Crown; it is delegated, and not inherent, and is defined by the Commission and instructions. By the usual form of the Commission (1), the Governor is Captain-General of the forces by sea and land within his province; he is one of the constituent parts of the General Assembly of his province; he has the custody of the Great Seal, with the same power as the Lord Chancellor of England; he is the Ordinary within his province, and presides in the Court of Error, of which he and the Council are Judges, and he is Vice-Admiral within his province, but does not sit in the Court of Vice-Admiralty, there being a Judge of that Court. The instructions formerly issued to the Governor of Trinidad are to be found in the memorable trial of *General Picton* (2) for a misdemeanour, in which the question turned upon the legality of the application of the torture by the law of Spain, and the liability of *the Governor for applying it. The case was thrice argued upon the special verdict, but no decision was pronounced by the Court. There is however nothing throughout these lengthened proceedings to give colour to the supposition that he could not be proceeded against, because he was Viceroy of the colony—no such ground was taken: the sole question was, whether it was a judicial act, and if so, whether the act done was according to the laws of Spain. The powers of Captains-General, Governors or Viceroys in Spain, are derived from *cedulas* (royal provisions) or instructions, as in this country, and no such privilege as that contended for here, is to be found in the books containing either the instructions or the laws relating to them (3). On the contrary, by the Recopulation de Leges it is provided that those who shall think themselves aggrieved by the acts of the Viceroy, or President, may appeal to the Audience, that is, the Royal Tribunal, and neither shall such Viceroy prevent such appeals, or be present at them (4).

The 11 & 12 Will. III. c. 12, is a declaratory Act (5). The preamble recites that the Governors, &c., “not deeming themselves liable”—that is no declaration that they were not liable; but the enacting part clearly shows the object of the Act, which

(1) Stoke's British Colonies, 154.

(2) 30 State Tr. 225, 499, 500.

(3) 1 White's New Recopulation,
367—372.

(4) Lib. 11, tit. 15, l. 35; 2 White's
New Recop. 34.

(5) 4 Inst. 284.

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was to enable parties to proceed in the Court of King's Bench here for offences committed in the colonies, and is analogous to the provisions of the Piracy Acts for offences committed on the high seas. The absence of any provision in that Act against civil injuries is a strong inference that Governors were amenable for such before *the Act. *Lord Bellamont's* case (1), *Comyn v. Sabina* (2), and *Fabrigas v. Mostyn*, all show such liability to attach to the office of Governor. In the latter case, Lord MANSFIELD says, "The great difficulty I have had in both the arguments has been to comprehend clearly what the question is which is meant seriously to be brought before the Court. It is said, 1st, that the defendant being Governor of Minorca is answerable for no injury whatsoever done by him in that capacity. It is truly said, that the Governor is in the nature of a Viceroy, and therefore, locally, during his government, no civil or criminal action will lie against him: the reason is, because upon process he would be subject to imprisonment;" and he adds, that "to lay down in an English Court of Justice such a monstrous proposition, that a Governor, acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property with impunity—is a doctrine that cannot be maintained." The case of *Harvey v. Lord Aylmer* is no authority here; it is manifest that Chief Justice SEWELL proceeded upon a misapprehension of the case of *Fabrigas v. Mostyn*; he states that to be decisive of the non-liability of a Governor; but the whole tenor of Lord MANSFIELD's reasoning and judgment is against such a conclusion. In *Tandy v. Earl of Westmoreland*, the act complained of was a political act, and for such, a Governor or Viceroy would not be liable any more than a Judge for a judicial act; but that is not this case: the question here is whether the appellant *can

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(1) 2 Salk. 625.

(2) Cited 1 Cowp. 169, 175.

(3) Sir T. Raym. Rep. 151; 3 BL Com. 255.

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lands? What reason is there against a similar rule here? There is, however, no pretence for presuming such exemption, for by the law of Trinidad there is no power of arrest before judgment; and after judgment, execution operates against both personal and real property before the person can be attached (1). With respect to the practice of the civil law, the passages quoted from the digest must be taken with great limitation. The officers, under the Roman law, nearest answering to our Governors of colonies, were the Presidents or Præses, who were sent into the provinces directly under the control of the Emperor (2), and though they could not be sued in any court of law, if they were vested with jurisdiction, and had a coercive and punitive power during the time of their office, yet at its expiration they might (3), and were obliged to remain fifty days in the cities or provinces over which they presided, after the expiration of their office, to enable the Provincials to prefer any claim or complaints *against them (4). Grotius confines the question of the non-liability of Kings, to such as are entrusted with legislative power, and distinguishes between the acts done by a person having such authority in his legislative or in his private capacity: in the latter there is no exemption (5).

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Dec. 18.

LORD BROUGHAM :

This is an appeal from the decision of the Court of First Instance of Civil Jurisdiction in the island of Trinidad, in which a petition was filed on the 24th of July, 1837, by Messrs. Thomas Bigge and Edmond Waller Rundell, the surviving partners of Philip Rundell and John Bridge, of the city of London, jewellers, to whom the appellant, Sir George Fitzgerald Hill, Lieutenant-Governor of the island of Trinidad, had executed a bond on the 10th of November, 1825, about twelve years previous, for the sum of £825 13s. sterling. The petition prayed a citation against the appellant to answer the premises, which citation was accordingly issued; was duly served, and the appellant was summoned to answer the petition so filed against him. He appeared under protest, and filed a plea setting forth that he was at the time of the petition being filed, and at the date of the plea, Lieutenant-Governor of the said island and its dependencies, and, as such Lieutenant-Governor, he was not liable to be sued in the said Court, nor bound to appear to

(1) Trin. Com. Rep. 12, 16, 69, 91.

(2) Dig. lib. 1, tit. 18, l. 1 & 6.

(3) Dig. lib. 5, tit. 1, l. 48.

(4) Bart. l. 24; Dig. 48, tit. 5.

(5) 2 Rutherford's Inst. 263—264.

any process issuing therefrom, nor to answer to any action instituted therein; and, according to the proceedings in that Court, the issue was joined upon the plea which leaves the whole *question for the Court, and the Court having heard the parties, postponed their judgment. They afterwards gave judgment, by which they ordered payment by the defendant, of the sum, together with interest, amounting to the sum of £1,578 9s. 7d., currency.

From this judgment the present appeal is brought; and the question raised in this case is, whether an action will lie against the Governor of a colony, in the Courts of that colony, while he is such Governor, for a cause of action wholly unconnected with his official capacity, and accruing out of the colony before his government commenced?—and this question appears to be one, whatever may be its importance, of no great difficulty.

It may safely be affirmed that they who maintain the exemption of any person from the law, by which all the King's subjects are bound, or, what is the same thing, from the jurisdiction of the Courts which administer that law to all besides, are bound to show some reason or authority, leaving no doubt upon the point.

The reference to analogies, or the supposition of inconvenient consequences, must be much more pregnant than any that can be urged in this case, to support or even to countenance such a claim. If it be said that the Governor of a colony is *quasi* Sovereign, the answer is, that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him: "The Governor" (said Lord Chief Justice DE GREY, in *Fabrigas v. Mostyn*, when that case was before the Common Pleas, which afterwards came by error into *B. R.) "is the King's servant: his commission is from him, and he is to execute the powers he is invested with under that commission; which is to execute the laws of Minorca, under such instructions as the King shall make in Council." It is proper to observe, that this was the case of the Governor of a Province formerly, and once belonging to the Crown of Spain, as Trinidad formerly did; and that one of the arguments for the defendant put his claim upon the highest ground, namely, that he was by the Spanish law and constitution absolute within a district at least of his government, having "supreme power vested in him, and being only accountable to God." Again this Court, in *Cameron v. Kyte* (1),

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when a claim to represent the Sovereign and hold the royal power by delegation was set up, refused to allow it, and considered him as only an officer with a limited authority. Their Lordships, in deciding that case, referred to the *dictum* of Sir WILLIAM SCOTT in *The Rolla* (1), that a naval commander may be reasonably supposed to carry with him such a portion of the sovereign authority as shall be necessary to provide for the exigencies of the service. But they said that this observation is plainly applicable only to the case of a commander carrying on war in a remote quarter, and the authority necessarily incident to that situation, and can have no application to the case of a colonial Governor. Nor must we forget, in reference to the position of the supreme power in the State, that by our law and constitution it is not in the Sovereign, but in the Parliament, the Sovereign himself being liable to be sued, though in a particular manner; and if his liability be such, even as much restricted as some have occasionally maintained, it would still be *greater than the appellant's argument supposes the liability of a Governor to be.

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The consequences imagined to follow from holding the Governors liable to action like their fellow subjects are incorrectly stated, and, if true, would not decide the question. For it by no means follows that because an action may be maintained and judgment recovered, therefore the same process must issue against the Governor as against another person, pending his government. His being liable to be taken in execution is not the necessary consequence of his being liable to have a judgment against him. There were anciently more instances than happily now, of persons privileged from legal process; but there still are some such exemptions, as privilege of Peerage and of Parliament, and of persons in attendance upon the Sovereign, and upon Courts of Justice. None of these privileges protect from suits, or more or less protect from personal arrest in execution, or judgment recovered by suit. Indeed the old, and we may now say obsolete writ of protection, which the King granted to his servants and debtors, purported to be a protection from all pleas and suits; yet the Courts held that no one should thereby be delayed in his action, but only that execution should be stayed after judgment: Cro. Jac. 419; 25 Edw. III. s. 5, c. 119(2). It may be observed in passing, that those protections were a provision made by the old law for the security of persons in the foreign

(1) 6 Robinson, Adm. Rep. 364.

(2) *Sic.* Probably a misprint for c. 19, rep. S. L. Rev. Act, 1863.

service of the Crown : as commanders of armies, ambassadors, and doubtless governors of the continental dominions also: Co. Litt. 130 a. It therefore is not at all necessary that in holding a Governor liable to be sued, we should hold his person liable to arrest while on service—that is, while resident in his government. It is not even necessary *that we should meet the suggestion of his goods in all circumstances being liable to be taken in execution—though that is subject to a different consideration.

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Next: suppose all these alleged consequences had been accurately stated, they could not necessarily decide the question : many cases might be put, of as great inconvenience, and even of as great violence done to public feeling, and as great mischief to the public service, by the execution of legal process, as any in the cases that have been put. Yet in none of these circumstances can it for a moment be pretended that the law is not to take its course. The inconvenience which would result from a general officer or an ambassador being taken in execution, on the eve of his departure on service abroad, or the mischiefs that would ensue to the administration of justice from a Judge being taken in execution almost at any time, are quite undeniable; but equally certain it is, that these inconveniences offered no argument whatever against the unquestionable liability of all those functionaries to undergo, like the rest of the King's subjects, the process of the law.

Indeed, it is manifest that if these alleged consequences prove anything, they prove too much; they go to set up an exemption from suit in the Courts of this country during the continuance of the Governor's functions. For nothing that happens to him within the limits of his own government could be much more injurious to his authority than his being outlawed in the Courts of Westminster, or having judgments against him there; supposing he prevented the outlawry by appearing to the actions.

Then, is there any authority of decided cases for *the position in question? It is unnecessary to say anything of *Tandy v. Lord Westmoreland*, because the question there arose upon an act of the Lord-Lieutenant in his capacity of Governor, and because there would be no safety in relying upon the report of the case; it ascribes *dicta* to the Court which there is every reason to suppose must be inaccurately reported, *dicta* in some of which it is impossible to concur.

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The case of *Fabrigas v. Mostyn*, when it came by error into the King's Bench, furnishes the only thing like authority for the

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contention of those who seek to impeach the judgment under review, and it is not pretended that the decision is upon the point now in question. An action of trespass and false imprisonment having been brought against the Governor of Minorca, he pleaded first the general issue, and then a justification: that he had, as Governor, and in the discharge of his duty, imprisoned and removed plaintiff, to prevent and put down a riot and mutiny in which he was engaged. To this special plea there was a replication *de injuria*, and both issues were found for plaintiff, whereupon the defendant having tendered a bill of exceptions on the ground that the learned Judge who tried the cause ought to have directed the jury to find for the defendant, because he had acted as Governor of Minorca, and was not liable to be sued in the Courts of England, for acts done in Minorca, a writ of error was brought in B. R., and the Court gave judgment for the defendant in error, (plaintiff below,) holding it quite clear that an action will lie, and that the learned Judge did right in not directing the jury as required by the defendant. There having been no evidence to support the plea of justification, there could be no objection taken to the finding of the jury, and a motion for a new trial in the Common *Pleas had been refused, whether made against the verdict or against the Judge's directions does not distinctly appear. Nor indeed is it quite clear from the report, in which way the Governor's counsel really meant to shape their case; and this, though three elaborate arguments had been held, is observed upon by the Court in passing the judgment.

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This much, however, is quite certain—that the decision is not against the liability of Governor Mostyn, to be sued in the island during his government, even for acts of state done by him, much less for a private debt—contracted in his individual capacity, before his government commenced. It is only a decision that he was liable to be sued in England for personal wrongs done by him while Governor of Minorca.

Nor does the decision thus given rest upon any doctrine denying his liability to be sued in the island. There is no doubt a *dictum* of Lord MANSFIELD in giving the judgment,—that “the Governor is in the nature of a Viceroy, and that therefore locally during his government no civil or criminal action will lie against him.” And the reason, and the only reason, given for this position is, because upon process he would be subject to imprisonment; with the most profound respect for the authority of that illustrious Judge it must

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be observed, that, as has been shown, the Governor being liable to process during his government, would not of any necessity follow from his being liable to action, and that the same argument might be used to show that an action lies not against persons enjoying undoubted freedom from arrest by reason of privilege. But the decision in the case does not rest on this *dictum*: on the contrary, Lord MANSFIELD goes on to say that another reason of a different kind “would alone be decisive,” *and indeed the *dictum* itself is introduced as if the question had arisen upon a plea in abatement to the jurisdiction—whereas it arose not on the pleadings at all, as his Lordship more than once remarked. Nothing can be more clear than the action being of a transitory nature: its being maintainable in Minorca would not have prevented it from lying in England also. It is a possibility that the expressions used may have been somewhat altered in the report. It certainly represents Lord MANSFIELD (1), to have treated the manner in which the Privy Council deals with colonial law, as a similar case to that of Courts having to examine questions of foreign law, which is proved as matter of fact. But supposing the report is quite accurate in all respects, the decision in no way supports the contention of the appellant.

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A case was decided in Parliament, at the end of Charles II.'s reign—*Dutton v. Howell*—which Governor Mostyn's counsel relied much upon, and in which the judgment of all the Judges (for it had been brought from the Exchequer Chamber and King's Bench) was reversed, and a Governor held not liable to be sued in England, for imprisoning a person guilty of official delinquency under his government. It is quite clear that this case afforded no precedent for Governor Mostyn's, much less for the defence to the present action. It went on the ground of the Governor and his Council having acted judicially; and though the counsel for the plaintiff in error before the House of Lords urged, among other things, that Governors of Scotland and Ireland could not be sued, so did they also contend, that it would be equally dangerous to sue privy councillors (2); a position probably as much disregarded by the House of Lords, *who reversed the judgment, as it certainly had been, with the other arguments of the same caste, by the Judges of the three Courts who had pronounced it.

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It is unnecessary to say anything respecting the statutory provision of 11 & 12 Will. III. c. 12, which in one view makes rather more against the appellant than it does for him, nor respecting

(1) Cowp. 174.

(2) Show. P. C. 27.

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the alleged judicial powers of the Governor of Trinidad, as he appears not to stand in the situation which has been supposed. It cannot be alleged that the process runs in his name; and even if he were (which he is not) the Court of Error, that would not decide that he cannot be sued. The Judges of Courts in this country, which have the most unquestionable jurisdiction in certain actions, are themselves liable to be sued in such Courts; and cases might easily be figured, in which great difficulty would arise how to try suits brought against them in consequence of their official position: but the possibility of such difficulties, whatever legislative enactments it might give rise to upon its nearer approach, can never surely be urged as a reason for denying what all men know to be the law, namely, that those parties are liable to be sued.

The judgment appealed from must, therefore, be affirmed, and their Lordships see no reason for varying from the general rule. It must, therefore, be

Affirmed with costs.

CHANCERY.

WARING *v.* WILLIAMS.

(2 Beav. 1—5.)

A husband became liable for bills of costs due from his wife, *dum sola*, and from her former husband, to a solicitor : Held, that though the relation of solicitor and client did not exist between the solicitor and the second husband, yet, that the latter was entitled to a taxation of the bills of costs.

A bill of costs, nearly the whole of which had been paid, contained items unconnected with professional employment, as for a horse, &c. : Held, that the solicitor ought, in taxation, to have credit for such items (if due), although they had not become due to him in the character of solicitor.

THIS was a petition of Richard Abram, praying for a reference to the Master, to tax such of the bills of costs delivered by Henry Rumsey Williams to the petitioner, as related to business done by him as attorney and solicitor of the petitioner's wife, after the decease of David Jones, her first husband, and before her marriage with the petitioner ; or if the Court should be of opinion that the petitioner was liable upon all the bills of costs delivered to him, then that the whole might be taxed, with such directions as the nature of the case might require.

It appeared that Henry Rumsey Williams had acted as the attorney and solicitor of David Jones, the first husband of Mrs. Abram, and that bills of costs were due *to him, on that account, when David Jones died in the year 1826.

Mrs. Jones, now Mrs. Abram, was the legal personal representative of her first husband, and was liable, out of his assets, to pay what was due to Mr. Williams for his bills of costs or otherwise ; and she employed Mr. Williams, to some extent, as her solicitor, and in that respect costs became due from her to Mr. Williams.

In December, 1831, Mrs. Jones was about to marry the petitioner, Mr. Abram : she was possessed of considerable property, of which a part was settled and other part was transferred to Mr. Abram. Whether any part of this property was derived from the assets of Mr. Jones was not stated ; but it appeared that at the time of her second marriage she admitted that she was considerably indebted to Mr. Williams ; and representing that her second husband was in want of money for his trading concerns, she requested Mr. Williams to give time for payment, and Mr. Williams acceded to that request.

1839.

May 17, 25,
28.*Rolls Court.*Lord
LANGDALE,
M.R.

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[*2]

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The bills of costs related to business done for Mr. Jones, and after his death for Mrs. Jones during her widowhood: they were seven in number, and amounted altogether to 530*l*. They were delivered to Mr. Abram on the 26th of October, 1832, and a letter written to Mr. Williams by Mr. Abram on that occasion, showed that the latter considered himself liable to pay what was due. He asked further indulgence, which was given, and it did not appear that Mr. Williams used any pressure for payment till the autumn of 1837, when applications for payment were renewed by Mr. Sheffer on behalf of Mr. Williams, and a payment of 514*l*. was made; and one question on the argument was, whether this was a

[*3] *final settlement. The circumstances under which the payment was made were stated by Mr. Sheffer in his affidavit, to the effect that the petitioner having sold a certain quantity of wine of the value of 514*l*., and received the purchaser's acceptance for that sum, endorsed it over to Henry Rumsey Williams, and delivered it to the deponent, who remitted it accordingly to Henry Rumsey Williams; and deponent thereupon, on behalf of Henry Rumsey Williams, signed and gave a receipt for the sum of 514*l*. to Richard Abram: "that very soon after the receipt of the bill of exchange by Henry Rumsey Williams, he, H. R. Williams, informed deponent that he would receive the same in full satisfaction of all his bills of costs and other demands then delivered against Richard Abram."

Mr. Williams, in his affidavit, stated the above circumstances as to the endorsement of the bill; and "that he, Henry Rumsey Williams, informed Thomas Sheffer that he would receive the same in full satisfaction of all his demands against Richard Abram on account of his said bills of costs so delivered as aforesaid."

The receipt given to Mr. Abram was thus expressed:

"8th of September, 1837.

"Received, of Mr. Richard Abram, the sum of 514*l*., on account of a bill of costs due from him and Elizabeth his wife (late Elizabeth Jones) to Mr. Henry Rumsey Williams, of Penrhos in the county of Carnarvon, attorney-at-law. For H. R. Williams,

"£514 0 0.

THOMAS SHEFFER."

The bills of costs contained an item of 42*l*., for the price of a horse sold by Mr. H. R. Williams to Mr. Jones, and it also contained charges for monies lent.

Mr. Pemberton and *Mr. Keene*, in support of the petition, suggested that the petitioner was not liable for the bills of costs for business done in the lifetime of *David Jones*.

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Mr. G. Richards and *Mr. Cockerell*, *contrà*, on behalf of *Mr. Williams*, objected to any taxation, on the ground, first, that the bills were never taxable at the instance of *Mr. Abram*, between whom and *Mr. Williams* the relation of solicitor and client never subsisted; secondly, that the bills had been admitted to be correct, and had been finally settled and paid, and ought not now to be subject to taxation.

Vincent v. Venner (1) was cited on behalf of the petitioner.

THE MASTER OF THE ROLLS :

May 28.

Neither the affidavits of *Mr. Williams* and *Mr. Sheffer* nor the receipt show that this transaction, or arrangement as it is called, was a final settlement of account, or that the 51*l.* was received as full satisfaction of all that was due to *Mr. Henry Rumsey Williams*; *Mr. Abram* does not appear to have had any reason so to consider it, but *Mr. Williams* says he told *Mr. Sheffer*, his own agent, who confirms the statement, that he, *Williams*, would receive the 51*l.*, in full satisfaction of all his demands on account of his bills of costs. (His Lordship stated the points argued.)

Under the circumstances proved in this case, I am of opinion that the petitioner did become liable to pay the bills of costs for business done for *David Jones*; and upon the authority of the cases (2) cited in the argument *I am of opinion that the bills were taxable at his instance.

[*5]

I am further of opinion, that although the bills were delivered in October, 1832, and were, therefore, in the possession of the petitioner for nearly five years before September, 1837, yet that the arrangement and payment then made was not a final settlement of the bills as between the petitioner and *Mr. Williams*; the bills were in the hands of the petitioner, and a payment was made on account, but no final settlement, no release, and no delivery up of vouchers took place, and under the circumstances, I think the bills ought to be now taxed.

It appears that one of the bills contains a charge of 42*l.*, for a horse sold to *Mr. Jones*; this is not a proper item to introduce into

(1) 36 B. R. 314 (1 My. & K. 212).

(2) *Sic.*

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a bill of costs, and yet may have been a sum justly due from Mrs. Abram as executrix of Jones; it ought not to be struck out.

In taking the account of what is due, the respondent is to have credit for such sums as were contained in the bills, and were justly due from Mr. Jones and Mrs. Abram, or either of them, although the same did not become due to Williams in his character of solicitor.

1839.
May 30.
July 16.

LEWIS v. FULLARTON (1).

(2 Beav. 6—14; S. C. 8 L. J. (N. S.) Ch. 291; 3 Jur. 669.)

Rolls Court.

Lord
LANGDALE,
M.R.

[6]

A work consisting partly of compilations and selections from former works, and partly of original compositions, may be the subject of copyright.

The defendant having published a book consisting of matter pirated from the plaintiffs' work intermixed with original matter, the COURT, without waiting till the whole of the pirated parts could be ascertained, enjoined the defendant from publishing his book containing any articles pirated from the plaintiffs' work.

THIS was a motion made on behalf of the plaintiffs, for an injunction to restrain the defendant, his agents, servants and workmen, from further printing, publishing, selling, delivering or otherwise disposing of any copies of a book called "A New and Comprehensive Gazetteer of England and Wales," published by the defendant, or any part thereof.

Mr. Pemberton, Mr. Kindersley and Mr. Hardy, in support of the motion.

Mr. Spence and Mr. Bacon, contra.

July 16.

THE MASTER OF THE ROLLS (after stating the terms of the notice of the motion):

The plaintiffs are the publishers of a work called "The Topographical Dictionary of England." It was prepared for publication at a very great expense, and with great literary assistance, and is, according to the evidence, a work consisting partly of compilations and selections from former works, and partly of original compositions, obtained for the plaintiffs at their own cost; and the plaintiffs allege, that such parts of their work as consist of compilations and selections have been subjected to investigation and inquiry in the localities to which they relate. There is no doubt but that a work of this nature may be the subject of

(1) *Morris v. Wright* (1870) L. R. 5 Ch. 279, 22 L. T. 78.

copyright; and on consideration of the evidence adduced in this case, I am of opinion, that for the purposes of this motion, I must consider the plaintiffs as entitled to the copyright *which they claim. The first edition of the plaintiffs' work was published in the month of May, 1831. It seems that some of the copies were corrected or varied in passing through the press, so that there are some differences between the copies of the plaintiffs' work, which constituted their first edition.

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A second edition was published in December, 1833, and a third in June, 1835.

The printing of the defendant's work commenced in the month of June, 1832, and it was completed in May, 1834. The plaintiffs having obtained a considerable sale for their work, were informed about the end of the year 1837, that the sale was interfered with by a Scotch work. In February, 1838, they were informed that this Scotch work was the defendant's Gazetteer; and upon examination of the work about June, 1838, the plaintiffs, as they allege, first discovered the piracy of which they now complain, and against which they seek to be protected. It has been attempted to be shown on the part of the defendant, that the plaintiffs must have been aware of the publication and contents of the defendant's work at a much earlier period, and ought, by their *laches*, to be now precluded from asking for an injunction; but on reading the evidence as to this point, I think it appears that the plaintiffs, although they had previously been informed of the title of the defendant's publication, did not know the character and contents of it till June, 1838; and as the bill was filed in the following month, there does not appear to have been any improper or unnecessary delay. On a comparison of the two works, it appears and has necessarily been admitted, that a considerable portion of the matter which is contained in the plaintiffs' work has found its way into the work of the defendant; for the defendant *insists, that with respect to such parts of the plaintiffs' work as are not original, he had a right to go to the sources to which the plaintiffs had previously resorted; that with respect to such parts of the plaintiffs' work as are original, a lawful use has been made of them,—the compiler has taken nothing *animò furandi*, but made only a fair use of a former publication on the subject of his own subsequent work.

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It is said that the defendant's book was undertaken by his late father, who employed Mr. James Bell to prepare it for the press; that Mr. Bell was supplied with a great number of topographical

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and other works, and amongst others, with the plaintiffs' topographical dictionary; that a fair use was made of all, and the plaintiffs have no right to complain of what has been done.

Any man is entitled to write and publish a topographical dictionary, and to avail himself of the labours of all former writers whose works are not subject to copyright, and of all public sources of information; but whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves, for their own profit, of other men's works still subject to copyright and entitled to protection; and the question is, whether Mr. Bell did or did not, for the compilation of the work in which he was engaged, avail himself of the plaintiffs' work unlawfully, and in violation of the plaintiffs' copyright.

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For the purpose of ascertaining this, I have read a very considerable number of articles in both works, the trouble of comparing them has been greatly diminished by the exhibits which have been prepared on both *sides; and the result of the examination appears to me to show that Mr. Bell, in the compilation of his gazetteer, has extensively, and as far as my examination has gone, it would not be too much to say habitually, made use of all that suited his purpose in the plaintiffs' work; it is evident, that in a large proportion of the defendant's work, no other labour has been applied than in copying the plaintiffs' work, and arranging the matter in the form which best suited the purpose of the compiler. Mr. Bell has evidently thought himself under no restraint, and probably did not think that the plaintiffs were entitled to any copyright; and if that which he did could be considered as lawful, it is plain no protection whatever could be given to any work in the nature of a gazetteer, dictionary, road book, calendar, map or any other work the subject-matter of which is open to common observation and inquiry; and that every man who had bestowed any amount of labour or expense in collecting and arranging the information requisite for the production of such a work, might immediately on its publication, be deprived of the fruit of his industry and ability. Having gone carefully through all the articles commented upon in the argument, and several others, I am of opinion that the defendant's work is, to a very considerable extent, a piracy of the plaintiffs' copyright.

To what extent it is so is not fully or accurately ascertained; and it appears to me that there are parts of the defendant's work,

which, in a publication of this nature, may justly be considered as original; certainly there are parts which are not taken from the plaintiffs' work, and as to which, if they stood alone, the plaintiffs would have no right to an injunction.

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Under the circumstances, the difficulty which pressed on the mind of Lord ELDON, in *Mawman v. Tegg* (1), arises in the present case. What was true in that case cannot be altogether denied in the present; "that notwithstanding all the pains which have been used, the enquiry, as to how much has been pirated, has left us in a great degree to conjecture, or rather we are left to conclude, from passages which are shown to have been copied from the original work, how much more has been so copied." And if it be correct to say, as Lord ELDON appears to have intimated, that the Court ought not to grant an injunction against the whole or the pirated parts of a work, without first ascertaining, either by its own inspection or otherwise, what was the quantity of matter pirated, then undoubtedly it would follow that an injunction ought not now to be granted: for this reason only, that though a considerable part of the work appears to have been copied, yet as the two works have not been compared in every part, it does not appear, on the whole, how much has been copied, or on the whole, what part of the defendant's work, with regard to the plaintiffs' work at least, can be considered as original. In the case I have mentioned, Lord ELDON made a very special order: but I cannot help entertaining some doubt, whether that order could have been acted on with advantage to either party. The parties, however, did not prosecute it, and the report adds, the suit was compromised by the payment of a considerable sum of money by the defendant to the plaintiffs.

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I conceive, that when it has been once ascertained that the defendant has in any degree violated the right of the plaintiff, the nature and extent of the order to be made must depend on the circumstances of the cases, and the amount and extent of the evidence adduced. The piracy proved may be so inconsiderable, and so little likely to injure the plaintiff, that the Court may decline to interfere at all, and may leave the plaintiff to his remedy at law; or the piracy proved may be extensive in a greater or less degree, —such as to leave it extremely doubtful whether the parts not examined are in any degree piratical, or such as to make it more or less probable that they have been composed in the same manner, collected from the like sources as the parts which have been

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examined, and are in an equal degree liable to the charge of piracy.

The hardship of restraining, or doing that which is equivalent to restraining the whole of a work, when part of it consists of original matter, has always been urged in cases of this nature, and the answer which is given by Lord ELDON, in the case to which I have already referred, seems conclusive: "If the parts which have been copied cannot be separated from these which are original without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing; if a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the other parts of the work cannot be separated, and if by that means the injunction which restrained the publication of my literary matter prevents also the publication of his own literary matter, he has only himself to blame."

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In cases of this nature, it must be observed, that nothing but an injunction can sufficiently protect the injured party. In the same case Lord ELDON has observed that, "though keeping an account of the profits may prevent the defendant from deriving any profit, as he may ultimately be obliged to account to the plaintiff for all his gains, yet if the work which the defendant is publishing in the meantime really affects the sale of the work which the plaintiff seeks to protect, the consequence is, that the rendering the profits of the former work to the complaining party, may not be a satisfaction to him, for what he might have been enabled to have made of his own work, if it had been the only one published; for he would argue, that the profits of the defendant, as compared with the profits which he, the plaintiff, has been improperly prevented from making, could only be in the proportion of the price of a copy of the one book to the price of a copy of the other." On the whole, for the reasons thus stated, it appears to me, that an injunction ought to be granted, whenever it appears, by sufficient evidence, that a copyright exists, and that piracy has been committed to an extent which is likely to be seriously prejudicial to the plaintiff; and that the extent of the injunction must depend on the amount of proof and the nature of the work. The plaintiffs

in the present case ask for an injunction, to restrain the defendant from publishing the whole or any part of the defendant's gazetteer. As it appears from the evidence that there are parts of the defendant's gazetteer which are not borrowed from the plaintiffs' work, I cannot grant an injunction in those terms; and it becomes a question, whether an injunction should be granted in general terms against such parts as have been pirated, or whether means should be taken to ascertain what particular parts have been pirated, in order that the publication of those particular parts may be restrained. *Now it appears to me, not, it must be admitted, by absolute proof and demonstration, for the two works have not been examined in every part, but upon proof and demonstration as to part, and as to the rest by strong inference and presumption, arising from the proof given as to those parts to which the proof applies, and from the nature of the work and the circumstances under which it is proved to have been composed, that if the parts pirated were taken away, though some articles would remain in their entirety, yet the greater number would be left in a state so imperfect and incomplete, that the defendant's work would lose its distinctive and useful character as a gazetteer.

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v.
FULLARTON.

[*13]

If the defendant were desirous to avail himself, as he has an undoubted right to do, of any original matter of his own, or of any matter which he has fairly taken from other sources, he would, I think, be under the necessity of recomposing his work, for the purpose of separating that which appears to me to have been improperly taken from the plaintiffs' work. Lord ELDON says (1), "In the cases which have come before me, my language has been, that there must be an injunction against such part as has been pirated, but in those cases the part of the work which was affected with the character of piracy was so very considerable, that if it were taken away, there would have been nothing left to publish except a few broken sentences;" and it was because the evidence before him did not enable him to approach sufficiently to that result, that he made the particular order which he did in that case.

But in this case, having availed myself of the evidence which has been so industriously collected during the long time that this motion was pending, and having *read with great care all the affidavits laid before me, and more particularly the affidavits of Mr. Holliday and Mr. Cunningham, I think that I have reasons on which I ought judicially to act, for considering that the parts of

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v.
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the works which have been examined and compared, afford fair indications of the nature and character of those parts of the works which have not yet been examined and compared; and it appearing to me, under these circumstances, that if the parts affected with the character of piracy were taken away, there would be left, I cannot say nothing but a few broken sentences, but there would be left an imperfect work, which could not, to any useful extent, serve the purposes of a gazetteer, I think that I ought to grant an injunction, to restrain the publication of the parts which are pirated, without waiting till all the parts which have been pirated can be distinctly specified; and therefore the order which I shall make will be: Let the defendant, his agents, servants and workmen be restrained from further printing, publishing, selling or otherwise disposing of any copy or copies of a book called "A New and Comprehensive Gazetteer," &c., containing any articles or article, passages or passage, copied, taken or colourably altered from a book called "The Topographical Dictionary of England," published by the plaintiffs.

1839.
Feb. 18, 19, 25.

Rolls Court.

Lord
LANGDALE,
M.R.

[17]

HOBSON v. BELL.

(2 Beav. 17—25; S. C. 8 L. J. (N. S.) Ch. 241; 3 Jur. 190.)

On a purchase from a mortgagee, of a fund standing in the name of trustees, it is not an essential blot on the title, that notice of the incumbrance was not given to the trustees, if it can be shown that no subsequent incumbrancer has given notice.

All objections to a title were to be taken within twenty-one days from the delivery of the abstract, or be deemed waived, and time was, in that respect, to be considered the essence of the contract: Held, that the twenty-one days did not begin to run, until a perfect abstract had been delivered.

A mortgagee had a power of sale in case of default being made in payment of mortgage money: Held, that the unsupported solemn declaration, under the 5 & 6 Will. IV. c. 62, of the mortgagee alone, of a default having been made, was not sufficient evidence of that fact, as between vendor and purchaser.

The certificate of a stockbroker, of a fund standing in the Bank, held insufficient evidence of that fact as between vendor and purchaser.

THIS suit was instituted by a vendor against a purchaser, for the specific performance of a contract for the purchase of a reversionary interest in a sum of 3,000*l.* Consols.

It appeared that William Welch, by his will dated in 1798, gave to three trustees certain property, in trust for sale, and to invest the produce in the 3 per Cents., and to place the same to the stock

then standing in his name in the books of the Governor and Company of the Bank of England, and apply the same in the manner thereafter mentioned. The trusts thereof (as determined by the Court on this occasion) were for the testator's widow, Ruth Welch, for life, with remainder to William Welch, the son, absolutely. The testator appointed his three trustees and Ruth Welch his executors.

. HOBSON
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BELL.

By an indenture dated the 25th of March, 1822, made between William Welch of the one part and William *Hobson of the other part, after reciting the will and death of the testator, the proof of his will by all his executors, and that the testator at the time of his decease was possessed of 3,000*l.* 3 per cent. Imperial Bank Annuities, standing in his name in the books of the Governor and Company of the Bank of England, and then standing in the name of Thomas Plant as surviving trustee under the will of the testator William Welch, William Welch mortgaged his reversionary interest in the 3,000*l.* Imperial Bank Annuities for securing 1,310*l.* 13*s.* stated to be due upon a judgment obtained by William Hobson in 1817. The mortgage was made subject to a proviso for redemption on payment of the principal, by half yearly instalments of 35*l.*, with interest at 5 per cent. The deed contained a power enabling the mortgagee, his executors, &c., in case of nonpayment of any of the said instalments or of the interest, to sell the reversionary interest, either by public auction or private sale, for such price as could reasonably be gotten for the same, and upon payment of the purchase money to give proper receipts for the same, which it was declared should be good discharges to the purchasers, who should not be answerable for any loss, misapplication or nonapplication thereof; and out of the money, after paying the expenses, the mortgagee was to retain the principal sum of 1,310*l.* 13*s.* and all interest then unpaid, and to pay the residue to the mortgagor.

[*18]

William Hobson died in August, 1831, and the plaintiff, Anne Hobson, was his executrix.

Default (as was alleged by the plaintiff) having been made in payment of the instalments, the plaintiff put up for sale, by auction, the reversionary interest in the 3,000*l.*, which was described as, 3,000*l.* being part of *3,100*l.* 3 per cent. Consolidated Bank Annuities standing in the books of the Bank of England in the names of trustees under the will of Mr. William Welch, deceased.

[*19]

The property was not sold, but was purchased by private contract by the defendants on the 13th of October, 1835, subject to certain special conditions of sale.

HOBSON
v.
BELL.

The fourth condition of sale was as follows: "The vendor shall deliver an abstract of title to the purchaser, or his solicitor, within two days of the day of sale, to the stock in question, and all and every objection to the title shall be made and communicated in writing to the vendor's solicitor within twenty-one days after the delivery of the abstract, and if the same be found valid the vendor shall be at liberty to rescind the contract on returning to the purchaser his deposit money; but all and every objection to the title not so taken and communicated within such period of twenty-one days from the delivery of the abstract aforesaid shall be deemed waived, and in this respect, time shall be considered the essence of the contract."

There were further conditions, to the effect that the purchaser should not require any other person than the vendor to join in the assignment, that all copies of deeds, &c., should be obtained at the expense of the purchaser, that any mis-statement, &c., should not annul the sale but should be the subject of compensation; and that on the purchasers failing to comply with the conditions, a resale might be made, and that the deficiency should be made good by the purchaser.

[*20]

Within the two days from the day of sale, the vendor's solicitor delivered an abstract of title, in which, however, material portions of the will of the testator were *omitted, and which was also imperfect in other particulars. The only evidence of the identity of the stock was the certificate of a stockbroker, that there was then standing in the Bank books the sum of 3,100*l.* in the joint names of the three trustees of the will of the testator; and the only evidence, of such a default in payment as to give the executrix of the mortgagee power to sell, was the solemn declaration of the executrix herself under the 5 & 6 Will. IV. c. 62, that the sum of 1,310*l.* 13*s.* with interest from the date of the mortgage, except the first quarterly payment, was then due on that security. The three trustees of the testator's will were stated to be dead, and a Mr. Plant was stated to be the survivor, but no evidence was produced as to these facts, except the recital in the mortgage deed.

A bill being afterwards filed by the vendor for the specific performance of the contract; a reference was then made to the Master as to the title, who reported that the plaintiff had made out a good title to the property, and that the plaintiff had delivered a perfect abstract previous to the filing of the bill.

The defendant took exceptions to this report, which now came on for argument.

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Mr. Pemberton, Mr. Blunt and Mr. Joseph Humphry, in support of the exceptions.

Mr. Kindersley and Mr. Rudall, contra.

Several questions arose on the argument of these exceptions of which the following were the principal :

First, whether the declaration of the plaintiff was sufficient proof of the power of sale having become exercisable. * * *

Secondly, whether the certificate of the stockbroker was sufficient evidence of the stock being then standing in the Bank, and whether the recital in the mortgage deed was sufficient evidence of the identity of the stock and of the trusts on which it was held. On this point it was observed, that it was the present practice of the Bank of England to allow no information to be given as to the amount of stock in their books.

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Thirdly, it was objected by the purchaser, that as the priorities of incumbrancers on trust funds, depended on the order in which they gave notice to the trustees; and as the trustees of the will were dead, it was now impossible for the purchaser to ascertain whether the trustees had received notice of any other incumbrances besides that of the plaintiff; that the plaintiff's title was therefore necessarily bad, or so doubtful that the Court would not force it on a purchaser: *Price v. Strange* (1).

Fourthly, it was said, that the conditions of sale were so depreciating as to amount to a breach of trust: *Ord v. Noel* (2).

Fifthly, the plaintiff insisted, that it was not competent for the purchaser to insist on any objection to the title which had not been communicated in writing within twenty-one days from the delivery of the abstract.

Sixthly, it was argued on behalf of the defendant, that supposing the Court to entertain any of the objections raised, the vendor, who was here a plaintiff, would not be entitled to any further inquiry as to the title: on this *Fildes v. Hooker* (3), *Portman v. Mill* (4) were cited.

[22]

The MASTER OF THE ROLLS, as to the first objection, said that the power of sale arose in the event of default being made in

Feb. 19.

(1) 22 B. R. 266 (6 Madd. 164).

(3) 18 B. R. 214 (2 Mer. 429).

(2) 21 B. R. 328 (5 Madd. 438).

(4) 26 B. R. 175 (1 Russ. & My. 696).

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payment of the instalments, the only evidence of which was the unsupported declaration of the plaintiff, an interested party ; that the case cited did not apply, and that in the absence of an authority, he could not hold that there was sufficient evidence that the event had happened on which the right of exercising the power of sale was to arise.

Feb. 25.

THE MASTER OF THE ROLLS (at the conclusion of the arguments on the other points) said :

The principal question which I have to decide is, whether this matter is to be referred back to the Master.

The defendant has raised many objections to the title, and alleges that their nature and the conduct of the plaintiff with regard to them are such, as to disentitle her to the indulgence of a further enquiry.

[*23]

With regard to all those objections, I am certainly of opinion that the plaintiff has not performed that which was her duty. In the first place, I think she has not done what she ought, in respect of proving the identity of the stock : it is impossible to rely on the certificate of a stockbroker, as the only evidence for the *purpose of showing that the stock is standing in the name of certain trustees. It is not easy to connect the 3,000*l.* Imperial Stock stated in the deed (supposing the deed to be evidence that there was 3,000*l.* Imperial Stock), with the stock standing in the name of the testator at the time of his death, and which it is alleged was subsequently converted into 3,100*l.* 3 per Cents. I think the purchaser was entitled to evidence of the identity of the stock, and also that it was subject to the trusts of the will, for on that the vendor's title depends ; this not having been produced, the defendant is entitled to further evidence on that point.

With respect to the trustees, and the notice given to them, this, undoubtedly, is a question of very great magnitude ; and, whenever it comes to be decided, it must be decided after the most careful consideration. I do not, however, understand, that in a transaction of this kind, it is an essential part of the title of the vendor to show that notice has been given to the trustees of the fund ; such notice is important, in order to prevent a subsequent purchaser or incumbrancer from obtaining priority ; but if no other purchaser or incumbrancer has given notice, then it does not appear to me to be material that the plaintiff has given no such notice of his deed. The object of notice is to exclude a subsequent purchaser and

incumbrancer on the fund; and if it can be shown that no subsequent party has come in, then the fact that notice has not been given, would not, as it seems to me, be an essential blot on the title. It is, however, necessary that full means should be afforded of most carefully enquiring whether notice has or has not at any time been given to the trustees; hence it becomes important to know, who were the persons filling the character of trustees from time to time. This has not been shown, neither has the time *when the several trustees died been proved, nor who was the survivor. It is said that this proof is not necessary, because an application was made by the purchaser to the party who was stated by the vendor to be the representative of the last surviving trustee. The application was naturally made to the person pointed out by the vendor, but that by no means renders it unnecessary to ascertain that the representation was really correct. No evidence whatever has been given that Plant was the surviving trustee; if he was not, the title, so far as it depends on that matter, is good for nothing.

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BELL.

[*24]

With regard to the breach of trust which is alleged, I cannot say that I very satisfactorily follow the argument which has been used on that subject, nor can I say that these conditions of sale are of such a depreciating character as to amount to a breach of trust, or constitute an objection to this title.

By the conditions of sale the vendor was to deliver an abstract of title to the purchaser, within two days from the day of sale; an abstract was delivered within that time, which was imperfect, not only in the particulars adverted to on a former occasion, but plainly imperfect in most, if not all, of the particulars mentioned in the third exception to the Master's report. To say that the time for making objections should run from the time of delivering that imperfect abstract, from which it could not be ascertained what objections there might be, appears to me extremely unreasonable. The objections could only be taken when a proper opportunity had been given for taking them, or when a perfect abstract had been furnished to the purchaser, and such an abstract has not yet been delivered. By the conditions, all objections to the title are to be made within twenty-one days from the delivery of the abstract, that is, *within twenty-one days from a time which has not yet arrived; the conditions also provide, that all objections not so taken within such period of twenty-one days from the delivery of the abstract shall be deemed waived, and that time shall be

[*25]

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considered the essence of the contract, as to the waiver of objections not taken within that time. It appears to me, that upon the construction of these conditions, and having regard to the abstract delivered, time cannot be considered as having been made of the essence of the contract.

The plaintiff I consider to have acted wrong: she has refused to produce the evidence which appears to me ought to have been produced; but on the whole, the plaintiff is not, in my opinion, to be precluded from having a further enquiry, if she thinks she can produce sufficient evidence to remove the objections which have been raised to the title.

1839.
April 13, 17.

Rolls Court.

Lord
LANGDALE,
M.R.
[25]

WORDSWORTH v. WOOD.

(2 Beav. 25—29; S. C. 3 Jur. 453.)

[FOR the report of this case on appeal (taken from 4 My. & Cr. 641) and in the House of Lords (taken from 1 H. L. C. 129), see 48 R. R. 191.]

1839.
April 10, 12.

Rolls Court.

Lord
LANGDALE,
M.R.
[31]

PICKERING v. PICKERING.

(2 Beav. 31—58; S. C. 3 Jur. 331.)

[AFFIRMED on appeal as reported in 4 My. & Cr. 289; see 48 R. R. 104.]

1839.
June 26.

Rolls Court.

Lord
LANGDALE,
M.R.
[63]

RIPPON v. NORTON (1).

(2 Beav. 63—66.)

Where an arbitrary power of applying the income of a trust fund for the benefit of individuals is determined, the objects of the power are entitled to share the income equally.

DR. RIPPON being possessed of the copyright of printed and manuscript books and of certain copies thereof on hand, by deed dated in January, 1832, in consideration of the natural love and affection which he had for his son John Rippon, assigned the same to trustees, upon trust, during the natural life of Dr. Rippon, to permit and suffer him and his assigns to manage and conduct the printing, publishing and disposing of the said printed and manuscript books and publications and works and the copies thereof, as fully and effectually as if the assignment had not been made;

(1) *In re Coleman, Henry v. Strong* (1888) 39 Ch. Div. 443, 58 L. J. Ch. 226, 60 L. T. 127.

RIPPON
 *
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and also to have, hold, receive, take, possess and enjoy all the profit, benefit and advantage arisen and produced and to arise and be produced therefrom, and the copies thereof and any new editions of the same, for his own absolute use and benefit; and after his decease, upon trust that the trustees, during the natural life of John Rippon the younger, should permit and suffer him to manage and conduct the printing, publishing and disposing of the said printed and manuscript books, publications and works and the copies thereof, and should permit and suffer John Rippon the younger to have, hold, receive, take and enjoy all the profit, benefit and advantage arisen and produced and to arise therefrom, for his and their own use and benefit during his natural life, in the mean time and until he should be declared a bankrupt, or seek relief under or take the benefit of any Act made and then in force or thereafter to be made for the relief of insolvent debtors, or enter into and execute any deed of composition with his creditors, or bargain, sell, mortgage or otherwise dispose of, by way of anticipation, the profits or produce of all or any of the said printed and manuscript books, publications *and works, or the copies thereof respectively, to any person or persons whomsoever; and from and after the said John Rippon the younger should become bankrupt or insolvent, or execute any deed of composition, or should bargain, sell, mortgage or otherwise dispose of, by way of anticipation, the profits or produce of all or any of the said printed and manuscript books, publications, or the copies thereof respectively, then and in such case the said trustees or the survivor of them or the executors or administrators of such survivor should thenceforth, during the then remainder of his natural life, pay and apply such part of the profits and produce of the said printed and manuscript books, publications and works, copies and premises as would have been payable or have belonged to him during his life, in such manner and to such persons, for the board, lodging and subsistence of himself and his family, as the said trustees or trustee for the time being should think proper; and from and after his decease, then upon trust for such persons as J. Rippon the younger should appoint, and in default and until such appointment in trust for his children.

[*64]

In the month of January, 1834, John Rippon the younger took the benefit of the Insolvent Debtors' Act, and executed the usual assignment of his estate and effects to his assignees.

Dr. Rippon, the settlor, died in 1836, and at his death he had in his possession a number of copies of the works, some of which

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v.
NORTON.

had been printed before the execution of the deed and some afterwards.

The trustees named in the deed refused to act, and the deed contained no power of appointing new trustees (1).

[*65] This bill was filed by the three children of John Rippon the younger, who were all infants, praying the establishment *of the deed, and that the rights of the parties under it might be ascertained, and that new trustees of it might be appointed.

The wife of John Rippon the younger, and the mother of his children, was living at the institution of the suit, but died before the hearing.

The questions in the cause were, first, as to the interests taken by the plaintiffs and the assignees of John Rippon the younger in the settled property; and secondly, whether the copies of the works which had been printed after the date of the deed, in the lifetime of Dr. Rippon, were subject to the trusts.

Mr. Tinney and Mr. Craig, for the plaintiffs, the three infant children of John Rippon the younger, contended that they and the assignees of their father were entitled to the property in equal fourth shares, as tenants in common; and that, consequently, the assignees of John Rippon the younger were entitled to one fourth of the profits, and the three children to the remainder.

Mr. Pemberton and Mr. James Russell, for John Rippon the younger.

[*66] *Mr. Loftus Wigram*, for the assignees of John Rippon the younger contended that it was clear that the deed was a mere shift and contrivance, to give John Rippon the younger such a life estate as would not pass to his assignees in case of his bankruptcy or insolvency; that it was therefore void, as being against the policy of the law, and a fraud on the Insolvent and Bankrupt Acts; that the discretion intended to be vested in the trustees had ceased on the insolvency of John Rippon the younger; *Piercy v. Roberts* (2), *Snowdon v. Dales* (3); that the *whole life interest passed to the assignees, who being empowered to execute the power of

(1) Thus the arbitrary power of distribution was extinguished, for new trustees appointed by the Court were not then generally competent to exercise special or arbitrary powers, but

the law is now altered upon this point; see the Trustee Act, 1893, s. 10 (3).—O. A. S.

(2) 36 R. R. 239 (1 My. & K. 4).

(3) 38 R. R. 173 (6 Sim. 524).

appointment vested in the insolvent were consequently entitled to the whole beneficial interest in the property.

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NORTON.

Mr. S. Sharpe, for the executor of Dr. Rippon, contended that the deed affected that part of the stock only which was in existence at the time of its execution; and that the books printed after the date of the deed and in the lifetime of Dr. Rippon, were part of his personal estate.

Mr. Tinney, in reply.

The MASTER OF THE ROLLS held that the effect of the deed was to declare a trust of a species of business, in which part of the property might be absolutely disposed of and new stock created in substitution; and that the books published after the date of the deed in the lifetime of Dr. Rippon, were therefore subject to the trusts of the deed.

His Lordship also held that the plaintiffs, the three children, were entitled to three fourths, and the assignees to one fourth, of the profits which might accrue during John Rippon's life.

COTTON v. COTTON.

(2 Beav. 67—70; 8 L. J. (N. S.) Ch. 349; 3 Jur. 886.)

A bequest was made to A. or his legal representatives. A. was dead at the date of the testator's will, having bequeathed his property on particular trusts: Held, that A.'s next of kin, according to the Statute of Distributions, were entitled to the fund.

1839.
July 9.
Rolls Court.
Lord
LANGDALE,
M.R.
[67]

JOSEPH COTTON, by his will dated in 1827, bequeathed his personal estate unto his wife, his two brothers and a Mr. Davis, upon trust to invest the same, and pay the dividends of one moiety to his wife for life or during widowhood, and subject thereto, to stand possessed of such moiety, and also the remaining moiety, upon trust for his children.

The testator died in 1828, leaving his widow and nine children surviving him; and his will was proved by his widow and his two brothers.

Subsequently, in 1834, John Lloyd made his will, by which, amongst other things, he gave as follows: "I direct that all the rest of my property, by which I mean money in the funds or elsewhere, after payment of my debts and funeral expenses and such

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legacy duty as I may hereafter direct to be paid out of my estate, and after payment of the same, I intend to bequeath to my executors, be divided between the gentlemen hereafter named who were supra cargoes in the China service of the East India Company, or the legal representatives of the said gentlemen, in the proportion that the sums set against their names bear to each other." The testator then enumerated twelve persons, opposite to whose names he placed different figures, and amongst the names was placed that of the first testator, Joseph Cotton, in the following manner :

" Joseph Cotton, Esq. - - - 3,402."

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The aggregate of the numbers so placed opposite to the names amounted to 18,350*l*. The testator afterwards proceeded as follows : " Should any of the gentlemen before-mentioned or their representatives decline to accept the bequest I have made to them, every bequest, acceptance of which may be declined, is to augment the proportions of the other parties, till they are, if possible, completely satisfied."

The testator John Lloyd died in December, 1837, and the sum ascertained to belong to Joseph Cotton, or his legal representatives, amounted to 2,243*l*.

The widow of Joseph Cotton presented a petition, praying a declaration that the sum was subject to the before-mentioned trusts of her husband's will, or that the rights of the parties therein might be ascertained.

The several points argued were as follows : first, whether the fund was subject to the trusts of Joseph Cotton's will ; secondly, whether his executors took beneficially as his " legal representatives ;" and thirdly, if the fund was divisible amongst the nearest of kin of Joseph Cotton (thus excluding the widow) or amongst his next of kin according to the Statute of Distributions.

Mr. Pemberton, for the widow.

Mr. Kindersley, for the children.

Mr. Bichner, for the husband of one of the children.

Mr. L. Wigram, for the two other executors of Joseph Cotton.

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[*Bridge v. Abbot* (1), *Long v. Blackall* (2), *Garrick v. Lord Camden* (3), *Price v. Strange* (4), *Baines v. Ottey* (5), *Robinson v. Smith* (6),

(1) 3 Br. C. C. 224.

(4) 22 R. R. 266 (6 Madd. 159).

(2) 4 R. R. 73 (3 Ves. 486).

(5) 36 R. R. 352 (1 My. & K. 465).

(3) 9 R. R. 297 (14 Ves. 372).

(6) 38 R. R. 78 (6 Sim. 47).

Gittings v. M'Dermott (1), *Wallis v. Taylor* (2), and other cases were cited.]

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v.
COTTON.

THE MASTER OF THE ROLLS :

This is a gift under the testator's will to a legatee or his legal representatives. The testator directs the residue to be divided between the gentlemen thereafter mentioned, or the legal representatives of those gentlemen, in the same proportions as the sums set against their names bear to each other. One sum is set against the name of Joseph Cotton, and this, therefore, is a gift to him or his legal representatives.

It is undoubtedly a matter of extreme difficulty to determine what a testator really means in cases like the present; but a construction has been put upon these words to which I am bound to adhere. In *Bridge v. Abbot*, *Long v. Blackall*, and *Walter v. Makin* (3) it has been considered that legal representatives mean those persons who are by law entitled to claim beneficially the undisposed of residue, and who are, in this sense, the persons legally representing the individual to whom the gift was first made. The question is, who are these persons; it has been contended that they are either the executors *or the next or nearest of kin; on the other hand it is argued that they are those persons who would be entitled beneficially under the Statute of Distributions; and I am of that opinion. When it is said that the expression "legal representatives" means next of kin, it is not that such is the force of the words themselves, but because the words are held to indicate the persons who, upon the construction of the will, are beneficially entitled in the place of the person to whom the gift was first made, and who, in that sense, legally represent such person. I must therefore refer to the Statute of Distributions, which points out those who are entitled to claim as the legal representatives in that particular sense of the words, and the authorities have determined that this fund belongs to those persons who are the next of kin, as designated by that statute.

[*70]

(1) 39 R. R. 139 (2 My. & K. 69).

(2) 42 R. R. 167 (8 Sim. 241).

(3) 6 Sim. 148, where this construc-

tion was supported by special context.
—O. A. S.

1839.

June 27.

Rolls Court.

Lord
LANGDALE,
M.R.

[70]

GREEN v. PULSFORD.

(2 Beav. 70—75.)

An estate was settled to the husband and wife successively for life, with remainder to their children as they should appoint, and in default of appointment between such children. The husband and wife encumbered their life interests, and in August the husband and wife, having seven children, appointed the whole estate to the eldest daughter; in October of the same year the husband, wife and daughter mortgaged the property for 8,000*l*. The mortgagee, under the power of sale in the mortgage deed, sold the property to the plaintiff; and after the title had been approved of, one of the younger children gave notice to the plaintiff not to complete and that the appointment was a fraud on the marriage settlement, and also cautioning the purchaser not to pay the purchase money; he did not, however, follow up the notice by any proceeding: Held, that notwithstanding this a good title was shown, and that the purchaser must complete.

By indentures of lease and release, dated in June, 1807, the freehold property which was the subject of the questions raised in this cause was conveyed to trustees, to the use of Francis G. C. Burridge for life, with remainder to the use of Mary Burridge his wife for *life; with remainder "to the use of all and every, or such one or more exclusive of the other or others, of the children or child of the said Francis G. C. Burridge by the said Mary his wife," for such estates and interests as Francis G. C. Burridge and Mary his wife should during their joint lives by any deed appoint, and in default of appointment, to the use of all such children, as tenants in common in tail.

[*71]

Francis G. C. Burridge had seven children by Mary his wife, namely, Elizabeth Mary, John and Julia, who had attained twenty-one, and Edward, George, Robert Arundel and Fanny, who were infants.

In 1826, Francis G. C. Burridge incumbered his life interest with an annuity of 846*l*., and in the same year Francis G. C. Burridge and wife mortgaged their life estates for securing 1,000*l*. and further advances to the extent, in the whole, of 2,000*l*.

By an indenture of the 16th of August, 1828, after reciting the settlement of June, 1807, and that Francis G. C. Burridge and Mary his wife had determined to appoint the property to the use of their daughter Elizabeth Mary Burridge, in fee-simple, it was witnessed, that in consideration of natural love and affection, they appointed that the property should, immediately after the decease of the survivor of them, Francis G. C. Burridge and Mary his wife, go, remain and be to the use of Elizabeth Mary Burridge in fee.

By an indenture of the 21st of October, 1828, the then mortgagees, being paid, reconveyed the estate.

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By indentures of the 30th and 31st of October, 1828, and by a fine levied, it was witnessed that in consideration *of 7,000*l.* to Francis G. C. Burridge and Mary his wife and Elizabeth Mary Burridge paid, they mortgaged the property to John Mabanke in fee, for securing that sum and interest.

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Francis G. C. Burridge died in June, 1830, and subsequently, by indentures of the 4th and 5th of August, 1831, the mortgage for 7,000*l.* was transferred to Mr. Pulsford, who at the same time made to Mrs. and Miss Burridge a further advance of 3,000*l.*, making in the whole 10,000*l.* By this deed Mr. Pulsford had a power of sale over the property in case of default being made in payment of the mortgage money.

In September, 1836, the defendant, Mr. Pulsford, put up the property for sale by auction, when the plaintiff became the purchaser of part for 4,200*l.* The abstract was delivered, the title approved of and the conveyance prepared; but on the 24th of April, 1837, before the final completion of the contract, the plaintiff and the defendant's solicitor received from Robert Arundel Burridge, one of the children of Mr. and Mrs. Burridge, a letter in the following terms: "SIR, I have been advised by a friend, that the title to the property at Horsmonden, Brenchley, or Bockingfold in Kent, which you purchased at the auction mart in October, is invalid, in consequence of the appointment by Mr. and Mrs. Burridge to their eldest daughter, and the immediate conveyance by them to a mortgagee, being a fraud on the marriage settlement under which I claim; I beg, therefore, to give you notice on behalf of myself and brothers and sisters, that we shall hold you responsible for the property which you have purchased, and we caution you not to pay the purchase-money, if it is not already paid. I remain, one of the sons of the aforesaid Mr. and Mrs. Burridge, your obedient servant, ROBERT A. BURRIDGE."

The defendant's solicitor gave notice to Robert A. Burridge that he would complete, and would hold the notice given by him abandoned, unless he took proceedings within a month to enforce his alleged rights; but he returned for answer, that he was not bound to take any proceedings until the death of his mother. He took no proceedings.

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The plaintiff, the purchaser, in consequence of the notice, refused to complete his purchase; and the defendant thereupon commenced

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an action at law for the recovery of the remainder of the purchase-money. The plaintiff then filed this bill, praying that the defendant might be decreed to show a good title; and that, if it should appear that the defendant could not make a good title, by reason of the claim of the children of Mr. and Mrs. Burrige, or from the invalidity of the appointment, then that the plaintiff might be relieved from the contract and have his deposit repaid.

Pending the proceedings in this Court the vendor recovered at law, but was prevented taking out execution by the common injunction.

Mr. Pemberton and *Mr. L. Lowndes*, for the plaintiff, contended that from the circumstances, there were reasonable grounds for suspecting, that the exclusive appointment which had been made to the eldest daughter in exclusion of the other children, had been made for the benefit of the parent, and was a fraud on the settlement; that these circumstances of suspicion, and the notice received from one of the objects of the power of his intention to contest the appointment, rendered the title so doubtful, that it could not be forced upon a purchaser; they observed that the plaintiff was a willing purchaser, and would be content to take the title if the Court should be of opinion that it was valid.

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Mr. Tinney and *Mr. Walker*, *contrà*, contended that the plaintiff, claiming under a purchaser for valuable consideration without notice of any fraud, could protect himself by means of his legal estate against any future claims of the younger children: they relied on *M'Queen v. Farquhar* (1) as showing that such circumstances of suspicion were not sufficient to relieve the purchaser from his obligation to perform his contract.

That the questions had been decided by the verdict at law, on which occasion the plaintiff might have raised even equitable objections to the title.

Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS:

In all cases of this description it is extremely inconvenient to be compelled to decide in the absence of parties whose claims may

(1) 8 R. R. 212 (11 Ves. 467).

hereafter arise; but such cases occasionally occur, as in *Du Hourmelin v. Sheldon* (1), in which case it was necessary to decide a question as to the rights of the Crown in a suit to which the Attorney-General was not a party. (His Lordship stated the circumstances of the case and proceeded.) This was the title under which Mr. Pulsford sold. The circumstances I have mentioned were fully stated in the abstract, and the title appears to have been approved of; and it could not, as I think, be otherwise than approved of after the judgment of Lord ELDON in *M'Queen v. Farquhar*. All this being done, but the purchase-money being unpaid and the conveyance not having been delivered over, a notice was given by one of the younger children of Mr. and Mrs. Burridge, that the appointment made in August, 1828, was in fraud of the *settlement. There was not, as I collect, one single fact stated, but a mere bare allegation was made, that the appointment was in fraud of the settlement; there was no more than the statement of that possibility which every body, upon looking at the transaction, must be aware might have existed. No doubt such a notice as this must have been very alarming to a party about to pay his purchase-money, and would necessarily lead to all the inquiries which could be made upon the occasion; but the question is, whether the mere circumstance of this notice having been given, without one single fact being brought forward in any way to impeach these deeds, ought to be a reason why the contract should not be specifically performed.

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There is nothing to show that Mr. Mabanke or Mr. Pulsford had not a good title but the simple allegation of this party, that what was done was a fraud upon the settlement. I cannot say that I think this, of itself, is a reason why the state of things which existed immediately before that notice should be considered so far altered as to entitle the plaintiff to say that the title is not a good title, or that the agreement ought not to be specifically performed. If it were possible to institute any inquiry as to the facts which took place, I think it ought to be done for the satisfaction of the purchaser; and, in a case like this, I am persuaded that the vendor would equally desire to have it done; but I do not see how that can be. I think the title must be considered as a good title, and the bill must be

Dismissed with costs.

(1) 48 R. R. 165 (1 Beav. 79).

1839.
June 22, 26.

Rolls Court.
Lord
LANGDALE,
M.R.
[76]

CASBORNE v. BARSHAM.

(2 Beav. 76—81.)

Signification of the term “undue influence” as applied to transactions between solicitor and client.

There are transactions in which there is so great an inequality between the transacting parties,—so much of habitual exercise of power on the one side, and habitual submission on the other, that without proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this Court will impute an exercise of undue influence.

When undue influence is to be inferred from the nature of the transaction, or when the transaction is contrary to the policy of law, it is the province of the Court to determine the point; and the question ought not to be sent to a jury.

THIS was a motion for a new trial under the following circumstances :

An issue had been directed, to try whether an indenture dated the 20th day of August, 1832, had been obtained from Dennis Chandler by the defendant Barsham by fraud or undue influence, as his solicitor.

The jury found, in effect, that the deed was not obtained by fraud, but was obtained by Barsham by undue influence, as the solicitor of Chandler.

The defendant Barsham now moved for a new trial, on the ground that the verdict, so far as it found that the deed had been obtained by undue influence, was against the evidence adduced at the trial.

The issue had been directed in a cause in which Mr. Casborne, as assignee of Dennis Chandler an insolvent, was plaintiff, and Barsham, together with two persons named Robinson and Matthew, were defendants.

The bill prayed that the deed might be delivered up to be cancelled, or that it might be allowed to stand only as a security for what, if anything, was justly due from Chandler to Barsham ; and it alleged, that Chandler, being wholly under the influence and control of Barsham his solicitor, was fraudulently induced to execute *the deed whilst wholly ignorant of the effect of executing it, and without any consideration having been given for executing the same, and for the purpose of giving to Barsham a fraudulent preference over Casborne.

Barsham admitted that he was Chandler's solicitor, and that Chandler was, to such extent as a client is generally, under the influence of his attorney and solicitor, but no further or otherwise ;

but he denied that Chandler was ignorant of the effect of executing the deed, or that it was executed without consideration, or for the purpose of giving a fraudulent preference, or that the deed was obtained by fraud or undue influence.

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Witnesses being examined, Dennis Chandler himself stated that he put his whole trust and confidence in Barsham, but that Barsham had no particular influence or control over him; and three witnesses, Frederick Wing, Dennis Chandler the younger, and Robert Chandler, stated that Barsham had great professional influence and control over Dennis Chandler. Witnesses were also examined as to the circumstances which took place before and at the time when the deed was executed, but the result not being satisfactory, the issue was directed.

Mr. Biggs Andrews, Mr. C. P. Cooper, and Mr. Elderton for the motion.

Mr. Pemberton, Mr. G. Richards and Mr. Gunning, contra.

THE MASTER OF THE ROLLS:

June 26.

The object of the first part of the issue was to ascertain whether Barsham had obtained the deed by fraud, by any suggestions of falsehood, or suppression of truth by misrepresentation or concealment of fact.

The object of the second part of the issue was to ascertain whether Barsham, availing himself of his character of solicitor, had obtained the deed by undue influence, and some discussion took place as to the sense in which the words "undue influence" had been understood.

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Omitting such transactions as are made void by the policy of the law, it is plain that there are transactions in which there is so great an inequality between the transacting parties,—so much of habitual exercise of power on the one side, and habitual submission on the other, that without any proof of the exercise of power beyond that which may be inferred from the nature of the transaction itself, this Court will impute an exercise of undue influence. Such cases have not unfrequently occurred in transactions between parent and child, and sometimes in transactions between persons standing to each other in the relation of solicitor and client.

But other cases do not rest solely on the nature of the transaction and the fact of habitual or occasional influence; it is required to

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show that some advantage was taken, or that there was some fear, some use of threat or of undue practice or persuasion.

When undue influence is to be inferred from the nature of the transaction, or when the transaction itself is contrary to the policy of the law, I apprehend that it is the province of the Court to determine the point, and that the question ought not to be sent to a jury.

And having regard to this bill and the particular charges which it contains, I am of opinion that the question to be tried upon this part of the issue was, whether Barsham, acting as solicitor, availed himself of his influence in that character to use improper inducements

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*to Chandler, whereby to prevail upon him to execute the deed.

The jury have negatived the fraud, and their finding in that respect is not disputed, so that I must on this occasion conclude that there was no deception and no misrepresentation or suppression of truth; but the jury have affirmed the undue influence, and the question is, whether that finding is supported by sufficient evidence.

It appears that Mr. Casborne sued Chandler for tithes in the Court of Exchequer, Barsham conducted the defence of Chandler as his solicitor, and on the 2nd July, 1828, there was a decree against Chandler. The question, whether he was to pay costs to the plaintiff, being at that time reserved, it was obvious that he would at least have his own costs to pay, and on account of those costs he was indebted in a large but then untaxed and unascertained sum of money to Barsham; and some time after the date of the decree, but when first does not precisely appear, Barsham proposed to Chandler to execute the deed in question. The nature and provisions of this deed are open to very considerable observation, and it is clear that the deed was executed on the suggestion and under the advice of Barsham, and also clear that when it was proposed to Chandler he objected to it, and that the preparation of the deed was for some time delayed. The proposal was communicated to the family of Chandler; his son Robert knew of it ten days or a fortnight before it was executed, and objected that if there were an assignment it should be for the equal benefit of all the creditors. He afterwards, two days before the deed was executed, went to the office of Barsham with Robinson, one of the trustees named by Chandler, the deed was read to him, *and he understood that it gave a preference to Barsham, and advised his father not to execute it; he says indeed that he did all he could to prevent his father signing the deed. He says also that his brother

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objected, and his father did not know what to do; he thought, however, that after the family had objected to it his father would not execute it.

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Hannah Chandler, the daughter, was at her father's house on the Friday before the Monday on which the deed was executed, Barsham was there, and, as she says, promised Chandler 50*l.* and a farm if he would sign the deed, and on that Friday and the following Saturday, Matthew, one of the trustees, made a valuation of the farming stock and of the household effects to be assigned. On the morning of the 20th of August, Sams, the partner, went with the deed to Chandler, who at that time declined to sign it, saying he wished to speak to his sons again before he signed; it was read over to him in the presence of Hannah, who seems to have perfectly understood that it gave a preference to Barsham, and Chandler signed it in the afternoon of that day. What were the motives which induced Chandler himself to sign the deed do not appear. It is plain that the two sons and the daughter objected to and opposed its execution, and it seems singular that they should not have stated what were the motives which Barsham offered, to induce the father to execute the deed against their objections. The evidence affords no indication of any exercise of power or control by Barsham over Chandler, or of any threat used by him, or of any persuasion, except such as may be inferred by the offer of 50*l.* and a farm, which offer would rather tend to show, that any influence which Barsham attempted to exercise as solicitor was insufficient. Chandler had the opportunity of consulting his sons, who appear to have *been capable of advising him and to have advised him, and whatever were the inducements offered by Barsham, they had not succeeded, even on the occasion of the last interview which Barsham had with Chandler on the subject, for on the last day, when Sams attended for the execution of the deed and, as he says, used no persuasions whatever, he found Chandler undetermined and desiring to speak with his son again before he signed, and the opportunity was given him to do so. On the whole, therefore, though the deed is of such a nature that I do not think Chandler ought to have been advised to execute it, and although the offers said to have been made to Chandler do in my mind throw some suspicion on the transaction, I do not find evidence of facts which appear to me to prove that the deed was obtained by the undue influence of Barsham, as a solicitor, and I think that the defendant is entitled to a new trial of that part of the issue.

[*81]

1839.

July 15.

BENNETT v. HAYTER.

(2 Beav. 81—84.)

Rolls Court.

Lord
LANGDALE,
M.R.

[81]

A testator bequeathed 1,000*l.* to "the Jews' poor, Mile End;" there were two charitable institutions for poor Jews at Mile End, and it not appearing which of the charities was meant: Held, that the fund ought to be applied *cy pres*; and the Court divided the bequest between these two charitable institutions.

THE testator Benjamin Hawes bequeathed as follows: "I leave, after the death of Lucy Hawes, as many thousand 3½ per Cents. to the following charities, viz., 1,000*l.* 3½ per Cents. to the Jews' poor, Mile End; secondly, 1,000*l.* ditto to the Society for Relief of Prisoners for Small Debts; thirdly, 1,000*l.* ditto to the Missionary;" and after making fifteen other charitable gifts, he proceeded: "nineteenth, 1,000*l.* to Methodist preachers; twentieth, twenty-first, twenty-second, to the preachers *in the Presbyterian, Baptist and Independent persuasion, 1,000*l.* to each; twenty-third, 1,000*l.* to the Roman Catholic persuasion; twenty-fourth, 1,000*l.* to Quakers' preachers."

[*82]

By the decree, made in May, 1836, it was referred to the Master to inquire what charities were meant by the testator by the description of the "Jews' poor, Mile End," "the preachers in the Presbyterian, Baptist and Independent persuasion" and "Quakers' preachers."

The legacy to the Jews' poor, Mile End, was claimed both by the treasurer and wardens of an hospital called "Beth Holim," in Mile End Old Town, founded in the year 1747 by the members of the congregation of Spanish and Portuguese Jews, for the sustenance and relief of the poor and destitute Jews of that congregation; it was also claimed by the trustees of another hospital called the Jews' Hospital, Mile End, for the support of aged poor and for the education and employment of youth, which had been established in 1795, for the relief of the class called German Jews and for the education of the youth of the same persuasion. These claims were supported by affidavits.

The Master found, that no sufficient evidence had been produced before him as to what charity was meant by the testator, by the description of "the Jews' poor, Mile End."

Both these charities filed exceptions to the Master's report.

Mr. Richards and *Mr. Stinton* claimed the legacy for the former charity; and

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Mr. Spence and *Mr. F. H. Goldsmid*, for the latter charity.

Mr. S. Sharpe, for the plaintiff.

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Mr. Wray, for the Attorney-General.

[*Powell v. The Attorney-General* (1), *Moggeridge v. Thackwell* (2), *Simon v. Barber* (3), and other cases, were cited.]

The MASTER OF THE ROLLS over-ruled both sets of exceptions.

The case, however, coming on for further directions,

THE MASTER OF THE ROLLS decreed to the effect following :

“ There being no charity answering the description of ‘The Jews’ Poor, Mile End,’ his Lordship doth declare that the charitable legacy of 1,000*l.* 3½ per Cents., given by the testator’s will to ‘the Jews’ poor, Mile End,’ ought to be applied to charitable purposes, having regard, as near as may be, to the objects intended by the said testator by the said bequest in the said will ‘to the Jews’ poor, Mile End;’ and it appearing to the Court that there are at Mile End, in the county of Middlesex, two charitable institutions only, for the relief of poor persons of the Jewish persuasion, namely, an hospital called ‘Beth Holim,’ situate in Mile End, Old Town, founded in the year 1747 by the members of the congregation of Spanish and Portuguese *Jews, for the sustenance and relief of poor and destitute Jews of that congregation, and an hospital called ‘The Jews’ Hospital,’ situate at Mile End aforesaid, for the relief of the Jewish poor of the class denominated German Jews, and that S. L. B. &c. are the treasurers and wardens of the said hospital called ‘Beth Holim,’ and that M. S. &c. are the trustees of the said charitable institution called ‘The Jews’ Hospital, Mile End,’ his Lordship doth order a moiety of the fund to be paid to the treasurer and wardens of the hospital called ‘Beth Holim,’ to be applied by them for the general purposes of the said hospital, and the other moiety to be paid to the trustees of the ‘Jews’ Hospital, Mile End,’ to be applied by them for the general purposes of that institution.”

[*84

His Lordship acted similarly with respect to some of the other charities; and on further directions, the legacy to “the preachers

(1) 17 R. R. 8 (3 Mer. 48).

(3) 29 R. R. 12 (5 Russ. 112).

(2) 6 R. R. 76 (7 Ves. 36).

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in the Baptist persuasion," was given in the following proportions, namely, one fourth to "the general Baptist fund," and the remaining three fourths to "the particular Baptist fund," as being the proportions corresponding with the relative number of preachers or ministers in each of such denominations of Baptists; and the legacy to the "Quakers' preachers" was given to the "meeting for sufferings" of the Quakers.

1839.
July 24.

WARD v. PAINTER.

(2 Beav. 85—94; 8 L. J. (N. S.) Ch. 295; 3 Jur. 974.)

Rolls Court.
Lord
LANGDALE,
M.R.

[FOR the report of this case on appeal, taken from 5 My. & Cr. 298, see 48 R. R. 321.]

1859.
July 2, 10.

ROBLEY v. ROBLEY.

(2 Beav. 95—104; S. C. 3 Jur. 694.)

Rolls Court.
Lord
LANGDALE.
M.R.
[95]

The presumption that legacies given by different codicils to the same legatee are cumulative may be rebutted by a later codicil, which stated that the testator had provided for the legatee in a sufficient manner by one or the other of two codicils therein referred to and thereby expressly confirmed, but which did not refer to two other previous codicils containing bequests to the same legatee.

THE question in this case was, whether certain bequests which were made by several testamentary instruments were cumulative or substitutional.

The testator having by his will, made in England on the 19th of January, 1808, made provision for his wife and children, soon afterwards went to the island of Tobago, and whilst there made a codicil dated the 18th of July, 1812, and thereby intending to provide for Edward and William, two illegitimate children, and such other children as he might have by Eliza Mackenzie, he desired that three female slaves (which he gave to Eliza Mackenzie for life) and their increase might be valued *at her death, and that the value of them might be divided among the children. And he gave to each of the children an annuity of 100*l.*, to be paid to Eliza Mackenzie for their support and maintenance until they respectively attained twenty-one years, and after that time for their own use and benefit. And he gave to his brothers, George and Joseph Robley, and William Brassnell, in trust for his natural children, the sum of 1,000*l.* each, to be raised as soon as might be convenient

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out of his estate, and to be paid to the children as and when they respectively attained twenty-one; but the trustees were permitted to make an advancement of 250*l.* for the benefit of each child.

The testator made a second codicil to his will on the 30th of August, 1813, and thereby excluded a Mr. Charles Brooke from being an executor and trustee of his will; but this codicil did not affect the interest of the natural children.

In the year 1814, Edward and William, the two illegitimate children named in the first codicil, died, and in 1814 and 1815 two other children named Frederick and Phillis Saida were born; and after the testator's death the first codicil was found with the names of Edward and William obliterated, and the names of Frederick and Phillis Saida substituted instead of them. The infant Frederick died in the year 1816, and Phillis Saida alone survived. In this state of things the testator made a third codicil dated the 15th of June, 1817: he thereby, as he said, re-executed his will and two first codicils, and having appointed James Cunningham an executor and trustee of his will and estate, he proceeded to appoint him guardian and trustee of his natural daughter Phillis Saida and any other natural child he might have, in which trust he joined his cousin, Paul *Kneller Smith; and reciting that he had in the hands of his said cousin 1,546*l.* sterling besides interest thereon, he gave the same to his natural daughter Phillis Saida, and in the event of her decease to her mother, Eliza Mackenzie; and in the same codicil he afterwards gave the further sum of 1,000*l.* sterling to Phillis Saida, and when his estates were cleared of all present demands upon them, incurred by him or charged upon them by him, the further sum of 4,000*l.* sterling.

The testator made a fourth codicil dated the 18th of June, 1817, which had no bearing on the present question.

In the year 1818 the testator had another natural daughter called Sybil, and he made a fifth codicil dated and signed the 9th of January, 1819, but which was re-executed in the presence of three witnesses on the 26th of October, 1821, and thereby, after reciting that he had purchased two estates and certain slaves, he expressed himself as follows: viz. "Now I do hereby declare that the said two estates and the slaves now thereon (about 312) are subject to the terms and conditions of my last will, with this further proviso and condition, that they are expressly charged with the two several sums of 5,000*l.* to James Cunningham and Paul Kneller Smith, their executors and administrators, in trust for my two natural

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daughters, Phillis Saida and Sybil (lately born), to be paid when and as soon as my executors may deem it convenient to my estate, and that in the mean time the said two sums shall bear interest, and the said interest be annually paid from the time of my decease, the interest to be applied for their support and education in England or the United States, and the principal shall be paid to them when twenty-one years, or married with the consent in writing of the said trustees. And, if this *my bequest should, for want of any legal formality or otherwise, not be effectual to charge these estates, I hereby declare that the said two legacies and the interest to grow due thereon shall be a charge on my whole estate, both real and personal, and payable thereout; but if either dies before twenty-one or marriage, her share shall sink into my personal estate, and also if either dies making no will."

Another daughter, Clara, was born in 1821, and the testator afterwards made a sixth codicil dated the twenty-sixth of October, 1821, which was as follows:

I do hereby make and publish these presents, as and for a codicil to the last will and testament of me, John Robley, bearing date in the month of December, 1807, or in the month of January, 1808, and desire that these presents may be annexed to and taken as parcel of the same will. And I hereby confirm and republish my said will, and the several codicils thereto respectively bearing date in or about August, 1813, and in or about January, 1818, by me made and executed, and intended to be taken as parcel of and annexed to the same will. And whereas, in and by one or both of the codicils to my said will, I have in a sufficient manner provided for my natural daughter Phillis Saida, therein described by Eliza Mackenzie Robley of the said island, and am desirous of making similar provision for my other children by the said Eliza since that time born, I do therefore give, devise and bequeath to my said other daughters by the said Eliza, named Sybil and Clara, and to each of them, an estate similar in all respects to that which by my said codicil or codicils I have given, devised and bequeathed to my said other daughter by the said Eliza; and I do hereby declare that the said Sybil and Clara, and each of them, shall have the same *provision as I have made for my said other daughter; and further, that the said provision for the said Sybil and Clara shall be charged and chargeable upon and payable out of my property in the same manner, in all respects, as the provision for my other daughter aforesaid.

[*99]

To this codicil there was added a memorandum, to the effect that the codicil therein mentioned to bear date in the month of January, 1818, was not duly attested to pass real estates, and that it was then re-executed by the testator.

The testator died in November, 1821, leaving his daughters Phillis Saida, Sybil and Clara him surviving, but Clara afterwards died an infant.

The question was, whether the several gifts to the testator's illegitimate daughters were cumulative or substitutional.

Mr. Pemberton and *Mr. Puller*, for the plaintiffs, contended that each of the daughters was entitled to 5,000*l.* only, being the amount of the legacies given by the fifth codicil : they cited *Benyon v. Benyon* (1), *Osborne v. The Duke of Leeds* (2), and other earlier cases.

Sir C. Wetherell and *Mr. John Romilly*, for Phillis Saida, and *Mr. Kindersley* for Sybil, contended that the gifts were cumulative, and that the daughters were entitled to the aggregate amount of the several legacies given by the different codicils : they cited *Wray v. Field* (3), **Mackenzie v. Mackenzie* (4), *Watson v. Reed* (5), *Gordon v. Hoffman* (6) [and other cases].

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[*100]

Mr. G. Richards and *Mr. Sharpe*, for the executors.

THE MASTER OF THE ROLLS :

July 10.

The question argued in this case is, whether the gifts made by the testator, John Robley, in favour of his natural children, by several codicils annexed to his will, are cumulative, or whether upon the true construction of the codicils, the last gift is not to be taken in substitution for the former. (His Lordship stated the will, and the first, second and third codicils.)

It is to be observed, that by the first codicil, the annuity of 100*l.* was to be paid to the mother for the support and maintenance of the children during their minorities, and that the two Robleys (the brothers) and William Brassnell were trustees of the portions of 1,000*l.*, and had power to advance 250*l.* for each child out of its portion ; and that the third codicil, although it purports to re-execute the first, takes no notice whatever of the provision thereby made for any of his natural children, or for the provision thereby made

(1) 11 R. R. 12 (17 Ves. 34).

(2) 5 R. R. 74 (5 Ves. 369).

(3) 26 R. R. 61 (2 Russ. 257).

(4) 26 R. R. 64 (2 Russ. 262).

(5) 32 R. R. 203 (5 Sim. 431).

(6) 40 R. R. 66 (7 Sim. 29).

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for Phillis Saida, if her name was then substituted for that of William in the first codicil, but proceeds, as if no previous provision had been made, to appoint guardians and trustees, and to give to Phillis Saida a specific legacy bearing interest, and other pecuniary legacies of greater amount than the legacies given by the first codicil.

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If we regard only the nature and amount of the legacies given by the two instruments, I think that the legacies given by the third codicil would not, according to the rules acted upon by this Court, be considered as a substitution for the legacies given by the first codicil. The specific legacy of 1,546*l.*, and the two further legacies of 1,000*l.* and 4,000*l.* without power of advancement, would not I think be considered as a substitution for the reversionary value of three slaves and their increase, for the annuity of 100*l.* and for the legacy of 1,000*l.* with power to advance 250*l.*; but cases of this kind are to be determined by presumptions, and we must look to all the circumstances.

When a testator makes distinct gifts by distinct codicils, the presumptions are that the gifts made by the subsequent codicils are additional to those made by the former, and that the testator when he made the last had not forgotten the former, and did not mean to make the last either in vain or in substitution for the former; but these are only presumptions, and they may be strengthened or rebutted by any circumstances which by just inference and presumption may enable us to ascertain what the intention of the testator really was. The nature of the legacies and the extent of interest in them which is given, are very material circumstances, but we must also regard the situation of the testator with respect to the persons for whom he is making provision, and the other directions which he may have given. This testator had placed himself *in loco parentis* with regard to the children of Eliza Mackenzie, and he was making provision for them as for his own children, and the fact of his having appointed trustees and guardians with reference to the provision he was making by the third codicil, and omitted to notice the trustees which he had appointed

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by the first codicil, and the provisions thereby *made, cannot be immaterial in the consideration of the question, whether the two provisions were to be accumulative, or the last was to be taken in substitution for the first. It is not probable that the testator intended to have at the same time one set of trustees for the provision made by the third codicil, and another set of trustees for a distinct sum of

1,000*l.* given by the first codicil,—that Mr. Cunningham and Mr. Smith should be guardians and trustees, whilst the power of advancing 250*l.* was vested in the two Robleys and Brassnell, and whilst under a positive direction in the first codicil, the mother was to receive the annuity of 100*l.* for the support and maintenance of the children.

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(His Lordship stated the fourth codicil of the 18th of June, 1817, the birth of Sybil, and the fifth codicil of the 9th of January, 1819, and proceeded :)

Upon this codicil it may be observed, that if we regard only the legacies and the interest in them which is given to the legatees, a legacy of 5,000*l.*, subject to be divested if the legatee should die before attaining twenty-one or marriage, would not be considered as a repetition of or substitution for two legacies of 1,000*l.* and 4,000*l.* not subject to be so divested, but the fifth codicil appears to make a complete and reasonable provision for the children; interest on the charges is to accrue from the time of the testator's death, and to be applied for the support and education of the children, and the legacies themselves, as soon as the executor may deem it convenient to the estate, are to be paid to the legatees on attaining twenty-one or marrying, and are only to be divested in case of death before twenty-one or marriage. This is in its nature reasonable, and the directions comprised in it, particularly that which orders the interest to be applied for the support and maintenance of the children in England or the United States, *are scarcely consistent with the co-existence of the direction in the first codicil, that the annuity of 100*l.* for the support and maintenance of the children should be paid to Eliza Mackenzie. It does, however, appear to me, that upon the construction of the first, second and fifth codicils, and having regard to the presumptions and indications of intention on which this Court relies, the question would in this case have been very doubtful. But the case does not rest here: another daughter, Clara, was born in the year 1821, and the sixth codicil is dated the 26th day of October in that year. In this codicil the testator expresses himself thus. (His Lordship stated that part of the codicil by which the testator confirmed and republished his will, and the several codicils stated to bear date in or about August, 1818, and in or about January, 1818, and proceeded :)

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From this first passage and the uncertainty and inaccuracy with which the testator mentions the dates, it would seem that he had not the will and the codicils referred to before him at the time when

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this codicil was written, but from the fact appearing that the codicil of January, 1819, was re-executed on the day of the date of the sixth codicil, it seems clear that the codicil of the 9th of January, 1819, was the one referred to, and was before the testator at the time when the sixth codicil was executed. The codicil of August, 1818, removed Mr. Brooke from being an executor and trustee, and was important to be noticed when the will was republished and confirmed, but it did not mention the children. The codicil of the 9th of January, 1819, contained the particular provision I have mentioned, complete in itself, but so made and expressed as to make it doubtful whether that provision was all or only part of that which the testator intended the children to have; and the sixth codicil, after containing a devise not material *on this occasion, proceeds as follows. (His Lordship stated the remainder of the sixth codicil.)

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And upon this codicil it appears to me, that the testator, referring to the provision which he has made for Phillis Saida by the fifth codicil, and thus expressly reciting that he has thereby sufficiently provided for her, makes his intention clear that he did not intend her to have that provision, which in itself he considered sufficient, in addition to other provisions mentioned in former codicils to which he did not refer. Wishing to provide for his three natural daughters, and seeming to think, when the sixth codicil was written, that Phillis Saida only was provided for by the fifth, he refers to that codicil, recites that he thought the provision thereby made for her sufficient, and desires that Sybil and Clara may be in all respects made equal to her; and whatever doubts may arise upon the former codicils, I think that the sixth codicil sufficiently indicates, that the several gifts are not cumulative; and that Phillis Saida and Sybil are only entitled to the provision made for them by the fifth codicil.



1839.
March 28.
Aug. 7.

THE ATTORNEY-GENERAL v. SHEARMAN.

(2 Beav. 104—112.)

Rolls Court.
Lord
LANGDALE,
M.R.
[104]

This Court has authority to exercise a discretion in charity cases; and where it appears that the prosecution of accounts and inquiries would not be beneficial but prejudicial to the interests of the charity, the Court will refuse them. The Court also discourages long and expensive litigation in charity cases for matters of small value.

THE facts of this case are stated in the judgment of the MASTER OF THE ROLLS.

Mr. Pemberton and Mr. O. Anderdon, for the relators contended that the lease stated in the judgment of the *MASTER OF THE ROLLS, though signed by a majority of the trustees, was a nullity, and that the rent was inadequate. They asked that the lease might be declared void, that a reference might be made to the Master for the appointment of new trustees, and that the representatives of John Shearman might be charged with the sums referred to in the judgment of the MASTER OF THE ROLLS, and might pay the costs.

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[*105]

Mr. Barber and Mr. G. Richards, *contrà*.

Mr. C. P. Cooper, for Mr. Ward, one of the trustees.

THE MASTER OF THE ROLLS :

Aug. 7.

This is an information filed by the *Attorney-General*, at the relation of James Hirrell Limmer and John Nicholls, against John Shearman and others, praying that the defendants John Shearman and his son, and such others as to the Court might think proper, might be removed from being trustees of the charity estates in question; that in case of need, an account might be taken of the rents received by the defendants, and particularly by John Shearman; that it might be declared that John Shearman ought to account for monies charged by him for land tax, repairs and other outgoings; that if the estate ought not to be vested in the churchwardens and overseers new trustees might be appointed; that a lease dated the 18th of August, 1826, might be declared to be invalid, and might be set aside and cancelled; that the defendants Isaac Last and Henry Last might pay 5*l.* 12*s.* 6*d.*, or such other annual sum, by way of increased rent, as might seem just; and for further relief.

This cause came on to be heard before the present Lord Chancellor when he was MASTER OF THE ROLLS, and on the 6th of June, 1835, he decreed, that as to the defendants Isaac Last and Henry Last, the information should be dismissed with costs; and that the information, except so far as it sought to have a scheme approved for the future management and application of the charity estate, should be dismissed as against all the other defendants, without costs; and he referred it to the Master, to approve of a proper scheme for the future management and application of the charity estates, and the rents and profits thereof.

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The relators not being satisfied with this decree, presented a

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petition to have the cause reheard at the Rolls; it would, I think, have been better if they had taken the case before the Lord Chancellor himself, as they had the opportunity of doing; but conceiving that they had a right to adopt the course they have done, I have considered the whole case.

The nature of the charity and the mode in which its funds have been applied, make it clear that a scheme must be provided for the future management and application of the property; and that part of the decree which directs a reference for that purpose is not complained of.

A part of the charity estate consisted of a farm which, on the 4th of August, 1813, had been let to Isaac Last, for a term of fifteen years from Michaelmas, 1812, at a rent of 52*l.* a year.

[*107] It seems that some time before, or in the year 1826, the defendant John Shearman had, by some means, and, as it is said, by means of his connections among the other trustees, acquired a great influence and ascendancy *in the management of the charity property; it is stated that he wished to have all his own way, and would not submit to any control of the other trustees over whom he had not influence: this conduct, no doubt improper, very naturally gave offence to Mr. Ward, another trustee, who justly thought that he and the other trustees ought to be consulted in the management and application of the property. Under these circumstances disputes and quarrels arose.

In 1826 there were eleven trustees, John Shearman and his son George, two persons of the name of Chenery, William Darby, Francis Scotchmer, Mileson Edgar, John Ward, Freeston Howman, John Kerry, and another George Shearman.

John Shearman, being in the management of the property, about July, 1826, appears to have agreed to grant a new lease of the farm to Isaac Last and his son Henry Last; and Isaac Last, according to the evidence of Mr. French, the solicitor to the trustees, called on Mr. French, and at the request of John Shearman, as he stated, ordered Mr. French to prepare a lease, similar in every respect to the then subsisting lease, except that the name of Henry Last was to be added as joint lessee. Mr. French accordingly prepared the lease, and Henry Last called for it and took it away, as he said, to get it executed by the trustees; and the trustees having been called upon for the purpose, it appears to have been executed by John Shearman and George his son, by the two Chenerys and by Darby and Scotchmer: Mr. Ward refused to

sign because he had not been consulted, and because he did not know on what terms it had been made; Kerry and George Shearman the shopkeeper refused because Ward did, and Mr. Edgar and Mr. Howman also refused; but the lease having been executed *by a majority of the trustees, the two Lasts have held the farm accordingly.

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Mr. Ward having been informed of the new lease, considered as to the means of setting it aside: a meeting of the dissentient trustees was held on the 9th of October, 1826; they acted as if the new lease were invalid, and resolved that the churchwardens should take immediate steps for letting the farm. This meeting, however, does not appear to have produced any result; and on the 22nd of March, 1827, a meeting of eight trustees was held and attended by Mr. Ward and Mr. Edgar, two of the dissentients, and by the six who had signed the new lease. At this meeting the trustees resolved as follows: Resolved that the farm at present occupied by Isaac Last is, in the estimation of the trustees here present, worth, to be let, 25s. per acre. Resolved that the whole property described in the feoffment of 1813, be surveyed and mapped by Mr. John Hayward of Stoke. Resolved that the farm now occupied by Last, when surveyed and mapped, be offered to him at the before-mentioned rent of 25s. per acre, for the term of eight years from Michaelmas next. Resolved that the last Monday in February every year be the day for auditing the accounts of the above charity; and that the meeting be held at the sign of "The Bottles," in Occold, and that Mr. John Shearman be appointed trustee to receive the rent due on Lady Day in each year.

These resolutions seem to assume that the lease which six of the trustees had granted to the Lasts might be got rid of; and they would scarcely be intelligible, if we did not bear in mind, that the farm was estimated to contain only forty-two acres, which, at 25s. an acre, would amount to 52*l.* 10*s.* 6*d.* per annum, only 10*s.* more than the rent reserved in Last's lease, and *that Shearman swears, that in his belief, a survey of the farm would prove, that the quantity did not exceed forty-two acres.

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The survey was made in 1827, and it appeared that the land contained 46 acres 2 roods and 17 perches, which, at 25s. an acre, would have produced 58*l.* 3*s.* rent.

It does not appear what, if any, steps were taken in consequence of the survey. Mr. Hayward states that John Shearman accompanied him during part of the time of his surveying the farm, but

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that he did not communicate the result to John and George Shearman, the two Chenerys, or any of them; he valued the farm as worth 58*l.* a year to let.

The Lasts continued in the possession and to pay the rent to John Shearman, who received it, and appears to have made various allowances for repairs and otherwise; and this state of things continued till the information was filed on the 14th of May, five years after the survey had been made.

What is in substance prayed for is, that the trustees who signed the lease may be removed, that the lease may be set aside, that the Lasts, in addition to the rent they have paid, may pay a further annual sum of 5*l.* 12*s.* 6*d.*, and that John Shearman may be charged with the sums allowed for repairs and outgoings.

It does not appear to me that any case is made against the Lasts; they have held and are holding under a lease executed by six out of the eleven trustees; there is no pretence of fraud or concealment on their part; the only complaint against them is, that they took
[*110] *a lease which five trustees refused to sign; there is no evidence of any notice being given to them by the dissenting trustees, and in fact they paid their rent to John Shearman, who was formally appointed receiver in March, 1827: I am therefore of opinion that the information was rightly dismissed with costs, as against Isaac Last and Henry Last.

The next question is, whether John Shearman ought to have been charged with any sum greater than 52*l.* which he might have received for rent, or with any sums improperly allowed for repairs and outgoings.

As for the rent, it is in this, as in so many other cases, doubtful upon the evidence, whether more than 52*l.* could have been properly and prudently demanded or insisted upon; though Mr. Watling says he offered 70*l.*, and Last himself was willing to give 62*l.* rather than quit; it may not have been prudent to insist on more than 52*l.*

The allowances seem to have been considerably more than appear upon the evidence to be justified; they do not appear to have been a subject of complaint till the information was filed; the grievance, as George Shearman the shopkeeper says in his evidence, was, that John Shearman wished to do everything his own way; Mr. Howman, Mr. Edgar and Mr. Kerry were dissatisfied because of his persisting to do everything his own way; but the witness recollects no disapprobation or dissatisfaction as to the application

and appropriation of the rents; Mr. Ward's evidence is to the same effect.

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This may be in part accounted for by the fact that accounts were not rendered to the trustees; but John *Shearman in his answer expressly states, that every year, about Easter Monday, he submitted his accounts to the inspection and examination of the churchwardens at a vestry meeting held in the parish, and he states in his first answer that his accounts, up to the month of April, 1830, were regularly entered at his request in the churchwarden's book, and this appears from the books to have been the case, so that the application of the rents was known, and the proof given by the relators, that there was no dissatisfaction, is material.

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But not considering it to be proved, that the rent was the best that could have been obtained, or that the rents were strictly applied as they ought to have been, the question arises, whether in such a case as this, having regard to the amount which is in contest, to the circumstances under which the information originated, and to the probability of obtaining any benefit for the charity, accounts and inquiries ought now to be directed.

I have no doubt that the Court has authority to exercise a discretion, and that, from the absence of any effectual check elsewhere, it has become absolutely necessary for the interests of charities, that such discretion should be exercised in proper cases.

My predecessor has shown by his decree that he considered this to be a proper case for the interposition of the Court, and on a consideration of all the facts proved, I have come to the same conclusion.

I am of opinion that a prosecution of the accounts and inquiries which are sought by this information would be prejudicial and not beneficial to the charity, unless more effectual means than the Court possesses *could be found, of altogether relieving the charity from costs and other prejudice to arise from the prolonged litigation in a matter of such small value; it consequently appears to me that I ought not to disturb the decree which has been made. I think it quite proper to discourage long and expensive litigation in charity cases for matters of such small value, and commenced under such circumstances as appear in this instance. On the whole I am of opinion that the decree ought to be confirmed, and that the relators ought to pay the costs of the rehearing.

[*112]

COLLINS v. CAREY.

(2 Beav. 128—129.)

1839.
July 23.
Rolls Court.
 Lord
 LANGDALE,
 M.R.
 [128]

Business relating to a trust estate was transacted by two solicitors in partnership, one of whom was a trustee of the estate : Held, in passing his accounts, that costs out of pocket could alone be allowed.

THE testator, Mr. Collins, appointed a Mr. Vining, a corn-merchant, and Mr. Carey, a solicitor, his executors and trustees.

Mr. Carey carried on business in partnership with Mr. Cross, and business relating to the trust had been done by the partnership.

[*129] The usual accounts of the testator's estate were taken in the Master's office, and the question now submitted *to the Court was this, whether the Master ought to have allowed more than costs out of pocket for the business so done by the partnership.

Mr. C. P. Cooper, for Mr. Carey, submitted that this case differed from *New v. Jones* (1), and *Moore v. Frowd* (2), inasmuch as here the business was transacted by a firm, one of the members of which was not a trustee ; that he ought not, therefore, to be deprived of his share of the costs, on the ground of his partner filling that character.

Mr. Tinney and Mr. James Russell, for the plaintiffs,

And Mr. Blunt and Mr. Walpole, for other parties, were not called on by

THE MASTER OF THE ROLLS, who thought there was no distinction, and disallowed the claim.

LITTLER v. THOMSON.

(2 Beav. 129—133.)

1839.
Jan. 24, 25.
Feb. 21.
March 25.
Rolls Court.
 Lord
 LANGDALE,
 M.R.
 [129]

Pending proceedings in this Court, attacks on the plaintiff and his witnesses were published, representing those proceedings as vexatious, and that the witnesses had in their evidence been guilty of perjury : Held, that this, being calculated to disturb the free course of justice, was contempt of Court.

THE question in this cause was as to the right of a tenant for a term of a nursery-ground to remove therefrom, on quitting the

(1) Unreported : see 45 R. R. 207.

(2) 45 R. R. 205 (3 My. & Cr. 45).

premises, trees and hedges which were of very long standing, and exceeding forty years' growth.

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v.
THOMSON.

On the 8th of November, 1838, the plaintiff obtained an injunction to restrain the defendant from selling, *cutting down or removing any full-grown or standard timber, fruit, or other trees, or any hedges, on the lands in the bill mentioned, except such trees or shrubs as might or could be removed in the ordinary course of his trade or business of a nurseryman, until answer or order to the contrary. This injunction had been obtained upon the affidavits of the plaintiff and two other persons. Subsequently to this, and pending a motion to dissolve the injunction various very violent articles appeared in the "Gardener's Gazette" reflecting on the plaintiff and the witnesses who had made affidavits in support of the injunction, and characterising the Chancery proceedings as vexatious and unprincipled, and representing the affidavits as containing glaring misrepresentations, which the editor believed, and heartily hoped, would lead to an indictment for perjury.

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In the course of the motion for dissolving the injunction, these publications were brought to the attention of the Court, and it was argued, from some passages contained in them, that they must necessarily have been inserted through the means of the defendant or his agents, as they alone could have furnished the information.

Mr. Pemberton and Mr. Craig, for the plaintiff.

Mr. Kindersley and Mr. Blenman, for the defendant.

THE MASTER OF THE ROLLS :

On the merits I have a very strong inclination of opinion, but I do not think it proper for me now to state it, for I consider it necessary before I ultimately decide this case, that I should have from the defendant or his solicitor some answer to the imputation of the great *offence which he is said to have committed. I must give him an opportunity of so doing, hoping that it will turn out that he has not committed it.

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It is of great importance to the defendant to relieve himself from this imputation. If parties in the prosecution of their rights are to be exposed to this species of attack, and are to be placed in such a situation that they cannot safely proceed in the defence of their rights, and if witnesses are in this way deterred from coming forward in aid of legal proceedings, it will be impossible that

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THOMSON.

justice can be administered. It would be better that the doors of the courts of justice were at once closed.

The defendant and his solicitor subsequently, by affidavit, denied any participation in the publication complained of.

The attacks on the plaintiff and his witnesses were however still continued in the "Gardener's Gazette"; in a subsequent number the case was represented as a persecution in which the defendant was suffering under the influence of treachery and falsehood; that the prosecution was founded on falsehood, and the whole weight of the case against him was supported by falsehood.

Feb. 21.
—

It was now moved, on behalf of the plaintiff, that Mr. Glenny, the editor and proprietor of the "Gardener's Gazette," might be committed for the contempt.

[*132] Mr. Glenny, in answer to this application, made a long affidavit, denying any intention of giving offence to the *Court, or of influencing or obstructing public justice, or prejudicing the case of the plaintiff; and stating that he had acted under the conviction "that he was advancing and promoting the cause of truth and justice," and that he had erred in ignorance, and without any improper motive or intention.

Mr. Pemberton and Mr. Craig, for the motion, cited *Pool v. Sacheverell* (1), *Anon.* (2), *Roach v. Garvan* (3), *Anon.* (4), *Lechmere Charlton's case* (5), *Greenwood v. Taylor* (6).

Mr. Kindersley and Mr. O. Anderdon, *contrà*, confined themselves to reading the affidavit of Mr. Glenny, leaving the whole matter, on that affidavit, to the favourable consideration of the Court.

THE MASTER OF THE ROLLS :

I shall not decide this case without first reading, with careful attention, the affidavit of Mr. Glenny. Whatever might have been his belief at the time he published these articles, that belief will not protect him from the consequences, if his publication has been of such a nature as to disturb the free course of justice. The effect of such publications would seem to be not only to deter persons from coming forward to give evidence on one side, but to induce

(1) 1 P. Wms. 675.

(2) 2 Atk. 469.

(3) 2 Dick. 794.

(4) 2 Ves. Sen. 520.

(5) 45 R. R. 68 (2 My. & Cr. 316).

(6) Before Lord Brougham in 1833.

witnesses to give evidence on the other side alone. What I am to consider is, whether these papers are or are not calculated to disturb the free course of justice.

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THE MASTER OF THE ROLLS :

March 25.

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I have no doubt but that this publication comes within the cases cited and is a contempt of Court. I am surprised that a gentleman of education and science should think that it was serving the cause of truth and justice, or likely to benefit the gardeners, whose interest he professes to advocate, to publish articles of this description pending the progress of a cause. Having regard, however, to the statements contained in the affidavit of Mr. Glenny, and not wishing to visit him with any greater severity than the circumstances require, I think that justice would be satisfied by ordering him to pay all the costs of the proceeding. On his doing this, I shall not be disposed to proceed further in the case.

PECK v. CARDWELL.

(2 Beav. 137—144.)

1839.
April 20, 22,
23, 30.

Rolls Court.

Lord
LANGDALE,
M.R.

[137]

Two out of three surviving partners are executors of the fourth. One of these executors together with the third surviving partner purchase the interest of the other surviving partner in the partnership property : Held, that the estate of the deceased partner was not entitled to participate in the benefit of the purchase.

In 1791, John Singleton, John Hodgson, Richard Cardwell and Henry Helme, all of whom were since dead, became the purchasers of some property in the neighbourhood of Liverpool, called the Hedge Hill estate, for the sum of 7,850*l*. The purchase money was advanced by Hodgson and Cardwell alone. On the 11th of February, 1791, the property was conveyed to the purchasers, and on the 19th of March following, Helme and Singleton mortgaged their shares to Hodgson and Cardwell, to secure to them their proportions of the purchase money which had been paid for them by Hodgson and Cardwell.

On the same day the parties executed an agreement, regulating the mode in which the land was to be laid out for building upon, and for selling the same in lots, from time to time, for their mutual benefit ; and it was agreed, that if either party or his heirs should be desirous of selling his share, it should be first offered to the other parties at a price to be fixed by the vendor ; and if refused

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CARDWELL.

[*138]

by the others, then it might be sold to any other person, to be first approved of by the rest; and if such purchaser should be refused or rejected by the rest, then the share was to be valued by arbitration; and if the *other partners refused to purchase at that valuation, then the party selling was to be at liberty to dispose of his share by public auction to the highest bidder.

Singleton, by his will, appointed Cardwell and Helme and a Mr. Edward Whiteside his executors and trustees, and devised to them his one-fourth share of the property on certain trusts; he gave them power to concur with the other parties interested in the property in opening streets, in selling, conveying, or making partition of the property, and power to sell any share which might be allotted to his estate in severalty.

Singleton died in 1798, his share being still subject to the mortgage to Hodgson and Cardwell. Cardwell and Helme proved his will. Edward Whiteside, who was tenant for life of Singleton's property, though he did not prove the will, seemed to have acted with Hodgson and Cardwell in the management of the property. Helme became desirous of retiring from the concern, and, on the 6th of June, 1798, an arrangement was entered into, by which Hodgson, Cardwell and Whiteside, described as partners, agreed to relinquish to Helme one acre and a quarter of the land absolutely, on his giving up all claim whatever to the remainder of the estate subject to his mortgage debt, which, it was alleged, was considered to be the value of the share so released. Edward Whiteside, the tenant for life under the will of Singleton, died in July, 1798, and thereupon the plaintiffs, who were then infants, became beneficially interested in Singleton's estate. After the death of Whiteside the one acre and a quarter of the partnership land was conveyed to Helme, and one-fourth of the value was carried to the separate account of the estate of Singleton, free from any charge, and at the same time Cardwell and Hodgson took to themselves Helme's interest *in the remainder of the estate. By this bill the plaintiffs insisted, that on the retirement of Helme from the partnership, the parties interested under the will of Singleton had a right to participate in the benefit of the purchase of Helme's share; they prayed for consequential accounts, and for a partition of the estate; they contended, that as the representatives of Singleton were entitled to the benefit of the option of purchasing Helme's share, and as the purchase had been made by persons, including Whiteside, who stood in the situation of partners as well as of executors and

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trustees, the estate of Singleton, was entitled to the benefit of the contract.

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v.
CARDWELL.

Mr. Kindersley, Mr. G. Richards and Mr. Booth, for the plaintiffs.

Mr. Pemberton and Mr. James Parker, for the principal defendant.

Mr. Parry and Mr. S. Sharpe, for other defendants.

The MASTER OF THE ROLLS reserved his judgment.

THE MASTER OF THE ROLLS :

April 30.

In the year 1798, the piece of land which is in question in this cause was vested, in equal fourth parts, in Richard Cardwell, John Hodgson, Henry Helme and the trustees of John Singleton's will; the trustees were Richard Cardwell, Henry Helme and Edward Whiteside. The estate was held subject to the agreement of the 19th of March, 1791, the shares of Helme and the share vested in the trustees of Singleton were subject to mortgages to Cardwell and Hodgson for the amounts of their shares of the purchase money; and the will of Singleton devised his share to his trustees, on trusts which enabled them to concur with the other *persons, i.e. with themselves Cardwell and Helme, and with Hodgson, or those claiming under them, in opening streets, in selling and conveying the property, and in making partition, and selling any share which might be allotted to the estate of Singleton in severalty. It does not appear to me that these parties can be considered merely as tenants in common of land, as to portions of which some of them were entitled partly as trustees and partly for their own benefit, or that they can be considered merely as partners in a trading concern, which the survivors were carrying on for the benefit of themselves, and of the estate of the one who was dead. They were tenants in common of the land subject to particular agreements, and they were partners subject to the agreement of March, 1791, and also subject, as to Cardwell and Helme, with respect to the share of Singleton, to their duties and responsibilities as trustees and executors of Singleton's will; and moreover Cardwell and Hodgson were mortgagees entitled to demand payment of what was due to them from Helme and the estate of Singleton.

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It seems that Whiteside, one of the executors and trustees of Singleton, and beneficially entitled to his residuary estate for life,

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was in some sense considered as a partner with Cardwell, Hodgson and Helme; and on the 6th of June, 1798, Cardwell, Hodgson and Whiteside, described as partners, agreed to relinquish an acre and a quarter of the land to Helme, on his paying the balance due from him to them and interest thereon, and giving up all claim whatever to the estate.

All parties to the transaction having long since died, we have nothing beyond the instrument itself, and our knowledge, necessarily imperfect, of the circumstances of the parties to explain what their meaning was.

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The provision that Helme was to give up his claim to the rest of the estate, in consideration of receiving in severalty a portion of that which was partnership property, leads to the inference that that which he was to give up was to be given up for the benefit of the remaining partners; and the terms of the agreement would lead to the inference, that Cardwell and Hodgson, two of the original partners, and Whiteside as representing the estate of Singleton, were to be considered as the remaining partners after the retirement of Helme; and it is upon this that the plaintiffs found their title to relief, for they say, that by the agreement of the 6th of June, 1798, the estate of Singleton acquired, and could not afterwards be deprived of, an absolute interest in that which Helme agreed to give up.

But other questions must unavoidably be considered. The share of Helme was charged with a mortgage debt of 1,837*l.* 10*s.* in favour of Cardwell and Hodgson, who were entitled to claim immediate payment, and if necessary, to take immediate steps to foreclose the mortgage; they were not bound, and it does not appear that they agreed in any way to give up this advantage. Cardwell, though one of the executors of Singleton, was entitled to obtain payment of the debt due from the estate of Singleton on the mortgage of his share of the estate. He was under no obligation to qualify or suspend his claim to recover the debt due on Helme's share for the benefit of Singleton's estate, and he was without authority to subject Singleton's estate to any risk or liability whatever, in consideration of acquiring for it a larger interest in the partnership property.

We do not know what course would have been pursued if Mr. Whiteside had lived,—what he might have been disposed to do to satisfy the mortgage claims of *Cardwell and Hodgson,—what responsibilities he might have been disposed to incur for the

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benefit of his family, or how far Cardwell and Helme might have been disposed to rely on him to secure themselves against any responsibilities of their own, for Mr. Whiteside died almost immediately after the date of the agreement, and before any thing was done to carry it into execution; and then arose the question, what Cardwell, Hodgson and Helme, as surviving partners, and Cardwell and Helme, as surviving trustees of Singleton, were to do. In fact, they conveyed to Helme one acre and a quarter of the partnership land, and carried to the separate account one fourth part of the value free from any charge, and at the same time Cardwell and Hodgson took to themselves Helme's interest in the remainder of the estate; the effect of which was, that the estate of Singleton obtained one fourth part of the value of one acre and a quarter of land, just as if it had been sold to any stranger, and continued entitled to one fourth of the residue of the property, subject only to the mortgage debt which Singleton himself had created.

The argument of the plaintiff is, that by the agreement of June, 1798, the estate of Singleton had actually acquired a right to participate in any benefit that could in any way be derived from the purchase of Helme's interest or equity of redemption in so much of the property as remained in partnership; and that by the subsequent transaction, the whole benefit of Singleton's estate was cut down to one fourth part of the value of that part of the partnership property which was conveyed to Helme; and that Cardwell and Hodgson obtained for themselves the whole of Helme's interest, or in other words, that Cardwell, Hodgson and Helme (Cardwell and Helme being both surviving partners, and also trustees of Singleton's estate), concurred in appropriating to *Cardwell and Hodgson that share of Helme's equity of redemption to which the estate of Singleton had previously become entitled; and I think that the argument would have been of great weight, if there had been authority to make Singleton's estate liable to additional debt in order to obtain an enlarged interest in the partnership, and if Cardwell and Hodgson had come under any obligation to forbear from demanding payment of the debt charged on Helme's share; but seeing no reason to think that Singleton's estate became entitled to any interest in Helme's share without paying, or becoming liable to pay one third of Helme's mortgage debt; and there being no authority to make Singleton's estate liable to pay any part of the mortgage, the argument appears to me to fail. If this were a purchase by the trustees of the trust property it would

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not be supported, either by the fairness of the transaction, or by the communications made to the friends of the infant cestuis que trust; but considering it, as it is, a partnership transaction, in which the interest of a deceased partner was affected by the restricted powers contained in the will of the deceased partner, and conceiving that it would have been a breach of trust to subject the assets of Singleton to any additional risk in the expectation of deriving an additional profit from an enlarged share in the partnership property, and that Cardwell and Hodgson were not bound to forego their own claim to payment, I do not think that the plaintiffs are entitled to the benefit they now seek. Being of this opinion, it is not necessary to detail minutely the effect of the long correspondence which has been proved. I see no reason to think that there was any intention to conceal any part of the transaction; but I have some doubt whether there is sufficient proof that the full particulars of the whole transaction were communicated in a manner and under circumstances to make it perfectly clear, that the cestuis que trust *knew every thing required to enable them to determine whether they would or not confirm the transaction, if it had been a transaction the validity of which depended on their confirmation.

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As the accuracy of the accounts which have been rendered is not disputed, otherwise than as those accounts have not given to the plaintiffs any thing in respect of the share which is claimed by the bill, the only question which remains is, whether the plaintiffs are entitled to a partition, and to have their fourth of the remaining partnership lands allotted to them in severalty, and I am of opinion that consistently with the agreement of 1791 there cannot be a partition. It is evident that, according to that agreement, the parties thereto and those claiming under them, were to hold the land remaining unsold together, for the purpose of selling the same in lots for building, according to a certain plan. The bill does not allege any equitable ground for putting an end to the agreement, but claims partition as a right. It seems, however, so unlikely that the interest of either party can be promoted by the continuance of the partnership, that I should be glad, if upon consideration some arrangement could be made for separating their interests and securing to each what he is entitled to, without varying from that plan which seems to have been adopted.

If no arrangement can be made, I think that the

Bill must be dismissed.

CURSHAM *v.* NEWLAND.

(2 Beav. 145—149.)

[In this case the certificate of the Common Pleas on a case referred to the Court of Exchequer, and reported in 4 M. & W. 101 (to be reported in 51 R. R.), was confirmed without argument by the MASTER OF THE ROLLS, with the addition that it was admitted by counsel on both sides and allowed by the COURT that the word "survivors" was to be construed as "others," and that the accruing shares were to be subject to the same limitations over as the original shares.]

1839.
Nov. 26.

Rolls Court
Lord
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THE ATTORNEY-GENERAL *v.* THE FISHMONGERS' COMPANY.

(KNESEWORTH'S CHARITY.)

(2 Beav. 151—172; on appeal, 5 My. & Cr. 11.)

1839.
Jan. 18, 19, 21
22, 23.
Nov. 9.

Rolls Court.
Lord
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Establishments or foundations for securing prayers for the souls of the dead are deemed to be superstitious, and within the statute of 1 Edw. VI. c. 14.

The COURT (without deciding whether directions to pray for the souls of the dead were or not unlawful, or prohibited by the Church of England,) held, that it might be properly deemed superstitious to create an establishment, or endow a foundation, to be continued in perpetuity and conducted with certain ceremonies supposed to be religious, for the purpose of securing the perpetual continuance of prayers for the souls of the dead, either alone or in connection with other observances within the express terms of the 1 Edw. VI. c. 14.

A testator, who died in the year 1529, devised lands in the city of London to the Fishmongers' Company, to the intent that they should perform his will in manner after declared. He then provided for obits and anniversaries, without limiting any term within which the expenses thereof should be confined, and he willed that the Company should provide four honest priests, studying in the universities, to pray for his soul there, paying to every of them 4*l.*, quarterly; he next directed the Company to provide thirteen poor men and women, being in poverty, to pray specially for his soul, &c., and he provided for a perpetual succession of such poor persons, and he directed the Company to pay them 8*d.* weekly, and the poor persons were to attend the anniversaries or obits, and he made other similar bequests. The statute of 1 Edw. VI. c. 1, afterwards passed, and the Crown subsequently, for valuable consideration, by letters patent granted to trustees of the Company a rent of 53*s.* 4*d.* a-year issuing out of the lands, being the annual rent lately payable in respect of the testator's two anniversaries, (without mentioning any other rents). By a subsequent statute of 4 Jac. I., all the lands &c. mentioned in the letters patent of

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Edward VI. were secured, as against the King and his successors, to the Companies, saving the rights of any person other than the King: Held, that the bequests to pray for souls were superstitious under the statute of 1 Edw. VI., and that under the letters patent and Act of Parliament the Company were entitled beneficially, discharged of any trust.

THE object of this information was to have it declared that certain lands, devised to the Fishmongers' Company by the will of Sir Thomas Kneseworth, became and were now vested in the defendants upon and subject to the charitable trusts and purposes expressed by the same will, and that such trusts and purposes might be carried into effect under the directions of this Court.

[*152] The lands in question belonged to Sir Thomas Kneseworth, whose will was dated the 13th day of April, 1513, *being in the fourth year of the reign of King Henry VIII.

By that will, after describing the lands, tenements and property of which he was seised, he gave and bequeathed the same to the warden and commonalty of the Fishmongers' Company, and to their successors, to the intent that they and their successors should keep, fulfil and perform his will and intent, and every article thereof, in manner and form as thereafter was declared and specified. His first direction was, that part of the revenues should be applied in repairing and, if required, rebuilding the premises, so and in such manner that the rents thereof should extend to so much money as should amount to the performance, payments and contentation of his legacies and bequests thereafter ensuing.

And after giving directions for obits and anniversaries, with various superstitious ceremonies attending the same, and without having limited any particular term within which the whole expense of the obits and anniversaries were to be confined, the testator proceeded to other directions, and willed that the Company should provide four honest priests studying in art or in divinity in the universities, to sing and pray there for ever specially for his soul, the soul of his wife, the souls of his father and mother, and of their benefactors, and all Christian souls, paying to every of the said priests, for their salaries, 4*l.* by equal quarterly payments; and he gave directions for maintaining a perpetual succession of such priests, and for securing the payment of their salaries. He next directed the Company to provide thirteen poor honest men and women, being of good fame and in poverty, to pray specially for his soul, and his wife's soul, and the souls aforesaid, and all Christian souls; *and he provided for a perpetual succession of such poor persons, and directed the Company to pay every of them weekly

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the sum of 8*l.*, and deliver to every of them yearly a certain quantity of cloth; and the poor persons were to be required to pray daily, and to attend to the anniversaries or obits.

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After having thus provided prayers for the souls of those he mentioned, by four priests and thirteen poor men and women, he directed the Company to pay to the prior and convent of Roseton (Royston) every year 4*l.*, by equal quarterly payments, on condition that the prior and convent there should find a priest to say mass in his church there every day, and the bell was to be rung; the priest was to have 3*l.*, part of the 4*l.* given to the prior and convent, and was to pray for Thomas Kneseworth's soul at the altar, and to say *De Profundis* for his soul and all Christian souls; and the bell-ringer, for ringing the bell and assisting the priest, was to have a noble, and the prior and convent were to have the remaining two nobles, for performing the other ceremonies thereby directed.

The next direction in the will was for the payment yearly to Newgate and Ludgate of 40*s.*, at the discretion of the wardens of the Company, in such things as the prisoners there should have most need of.

The testator next directed the Company to appoint a receiver of the rents, to oversee the repairs and buildings, and out of the rents to pay for the reparations and other charges, and to keep accounts; and the Chamberlain of London was to attend the taking of the account, and to receive 8*s.* 4*d.*; and on the occasion a breakfast was to be provided at the expense of 13*s.* 4*d.*; and the receiver was to have 40*s.* a year; and if the account was not yearly made, the wardens were to forfeit "in the *name of a fine and pain for the default" 10 marks, to be levied of the rents of the devised estates, to the use of the city of London.

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The testator then directed that all the rents above the charges and outgoings should be laid in a chest in the treasury house of the Company, to the intent that the lands and messuages should be repaired and new builded when need should be. He then directed that his executors should pay 100 marks to be kept in the treasury house, to the intent that the premises might be the better and truly performed, observed and kept. And he willed that every honest man of the Company who would borrow 20 marks, or 10*l.*, of the same 100 marks, and of the money remaining of the rents for a half-year's space, and lay a sufficient pledge into the treasury for the repayment thereof, and also say five paternosters and five aves

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and a crede for the testator's soul and the souls above said, should have delivered unto him by the said wardens 20 marks, or 10*l*. And upon repayment the same money might be re-lent, the party borrowing always saying at the time De Profundis, or five pater-nosters, five aves and a crede for the testator's soul and the souls above said. And in case the Company of Fishmongers should make default in performing the trusts or any of them, the testator declared the gifts void, and gave the estates over to the city of London, to the intent that the trusts might be performed by them, except the lending any money, and except that the Fishmongers should have no profit of the aforesaid lands &c., but by the discretion of the mayor and aldermen of the city.

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The testator died in 1529, and the statute of the 1 Edw. VI. c. 14, afterwards passed, by which it was enacted (1), that *the King should have and enjoy for ever all lands which by any assurance, will, devise or otherwise, at any time theretofore made, were given or to be employed wholly "to the finding or maintenance of any anniversary or obit or other like thing, intent or purpose, or of any light or lamp in any church or chapel, to have continuance for ever, which had been kept or maintained within five years next before the first day of that Parliament"; and also (2) that where but part of the issues or revenues of any lands or hereditaments had been given or appointed to be bestowed or employed "to the finding or maintenance of any anniversary or obit or other like thing, intent or purpose, or of any light or lamp in any church or chapel, to have continuance for ever," that then the King should for ever have and enjoy every such sums of money that in any one year within the five years next before the first day of that Parliament had been expended and bestowed, about the finding or maintenance of any such anniversary or obit or other like thing, intent or purpose, of any light or lamp, to him, his heirs and successors for ever, as a rent-charge to be paid yearly, with power of distress and entry for default of payment.

After the passing of the statute of Edward VI. questions arose as to the effect of it in particular cases: when gifts had been made to superstitious uses, it was often doubtful whether the statute vested the land itself, or only particular annual payments as rent-charges in the Crown.

An arrangement took place between the Crown and the Fishmongers and the other Companies of the city who were in

(1) Sect. 5.

(2) Sect. 6.

similar circumstances, for the purchase, by the Companies, of the rent-charges to which the Crown *had or was supposed to have become entitled, for the sum of 18,744*l.* 11*s.* 2*d.*, and Augustine Hinde, Richard Turke and William Blackwell were appointed to carry that arrangement into effect; and by letters patent dated the 14th of July, 4 Edward VI., in consideration of the same sum of 18,744*l.* 11*s.* 2*d.* paid to the treasurer of the Court of Augmentations by Hinde, Turke and Blackwell, the King granted to them various rents, annuities and yearly sums issuing out of the lands belonging to several Companies of the city of London, and amongst other Companies, the warden and commonalty of the mystery of Fishmongers; amongst the rents, annuities and yearly sums issuing out of the lands and hereditaments of the Fishmongers' Company were the following, viz., all that one rent, annuity or yearly sum of 53*s.* 4*d.* by the year, issuing out of the two quays called Crown Quay and Greenberry's Quay, and out of nineteen messuages or tenements of the same wardens and commonalty, situate and being within the parish of St. Dunstan in the East, London, and out of four tenements of the same warden and commonalty, situate and being within the parish of St. Margaret, Bridge Street, London, which same yearly sum, rent or annuity the same warden and commonalty had then lately paid and yearly been accustomed to pay towards the perpetual support of two anniversaries in the chapel called _____, London, for the soul of Sir Thomas Kneseworth, Knight, late alderman of the city of London, deceased; and all that one rent, annuity or yearly sum of 12*s.* by the year, issuing out of the same messuages and the quay called the Crown Quay aforesaid, in the parish of St. Dunstan in the East, London, which same yearly sum, rent or annuity the same wardens and commonalty had then lately paid and yearly been accustomed to pay to the late prioress of the late *monastery of Kilburne (1); and all that one rent, annuity or yearly sum of 10*s.* by the year, issuing out of the same messuages and quay in the aforesaid parish of St. Dunstan in the East, London, which same yearly sum, rent or annuity the same wardens and commonalty had then lately paid and yearly been accustomed to pay to the late prior of the late

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(1) These were quit-rents belonging to the dissolved monasteries which had vested in the Crown under the statute of 26 Hen. VIII. c. 28, or the

31 Hen. VIII. c. 13, and were unconnected with the bequests in the will of Sir Thomas Kneseworth.

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monastery of Merton, in the county of Surrey (1); and all that one rent, annuity or yearly sum of 10s. by the year, issuing out of one messuage of the same wardens and commonalty, situate in Bridge Street, London, then or then late in the tenure of Simon Mawe, fishmonger, which same yearly sum, rent or annuity the same wardens and commonalty had then lately paid and yearly been accustomed to pay to the late abbess of the late monastery of Barking, in the county of Essex (1); to have, hold and enjoy all the rents therein mentioned and their appurtenances to the said Hinde, Turke and Blackwell, their heirs and assigns for ever, to their own proper use, without accounts, rent, service or other thing for the same to be rendered, paid or done.

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A statute of the 4 Jac. I. c. 10 (2) afterwards passed, by which it was recited, that in times past, divers messuages and lands were devised, in fee simple, to the use of divers Companies in the city of London, who for divers years had enjoyed the same, and employed them to the comfort of many good subjects, and great relief of the poor, and other good and charitable uses; that many of the same devises had theretofore been sought to be avoided, and the lands to be evicted, and *the King to be entitled thereunto, as concealed or unjustly detained from him; yet his Majesty, taking knowledge of the several compositions made, and great sums of money thereupon paid for the same, both in the time of King Edward VI. and of Queen Elizabeth, and of the good and charitable employment of the said lands, and especially taking knowledge of the letters patent of King Edward VI., dated the 14th day of July, in the fourth year of his reign, whereby, in consideration of 18,744*l.* 11*s.* 2*d.*, the King granted to Augustine Hinde, Richard Turke and William Blackwell and their heirs, divers rents, annuities, pensions and annual profits issuing or employed out of divers messuages and lands of several Companies of the city of London therein stated, and, amongst others, of the warden and commonalty of the mystery of the Fishmongers; and that since such grant, questions had been moved, whether the rents mentioned in the grants, or the messuages and lands whereout those rents were mentioned in the same grant to be issuing or employed, were concealed or wrongfully detained from the Crown, and both for the one and the other divers compositions theretofore made: Therefore, for the taking away of all doubts and questions, the King, minding that the lands and hereditaments mentioned in the grant should be so assured and

(1) See note (1), last page.

(2) A private statute.

established, as that the same should remain and continue to the Companies and their successors and assigns, and to their uses, trust and confidence for ever, was pleased that it should be enacted, and it was enacted by Parliament, that all such messuages, lands, rents and hereditaments as had been theretofore devised to any of the said Companies, and which lands, tenements, rents and hereditaments were mentioned or named in the letters patent of Edward VI., should and might for ever thereafter be lawfully held and retained by the said several Companies for ever, against the King and his heirs and successors, without *any rent, account or other profit to them to be paid for the same, any defect in the letters patent notwithstanding; saving the rights of any person, other than the King, his heirs and successors, and those claiming under him or them, and not claiming under the Companies.

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This information was filed in 1839, its object being, as has already been stated, to obtain a declaration that the estates were subject to the charitable trusts mentioned in the testator's will, and to have them carried into effect under the direction of the Court.

As to the various payments directed by the will, it was alleged by the relators, that all but one, which was for maintaining an anniversary and obit for ever, were for charitable uses, which ought to be carried into effect by this Court, either pursuant to the directions of the will, or as near thereto as reasonably might be, having regard to the changes of circumstances which had taken place. On the other hand the defendants alleged, that of all the payments which the will directed to be made, one only, namely for the prisoners of Newgate and Ludgate, was for a purpose which could properly be considered as a charitable purpose; that all the other payments were directed to be made for superstitious uses, and that the only charitable purpose had been fully performed. The defendants further contended, that the sums directed to be applied to superstitious uses, or the lands out of which they issued, became vested in the Crown, under the statute 1 Edw. VI. c. 14, which passed in the year 1547; that by the letters patent, dated the 4th of July, 1550, which was in the fourth year of the reign of King Edward VI., the various sums directed to be so applied, and which had become vested in the Crown, were, for valuable consideration, granted by the King to the Fishmongers' Company; that by the grant *of these sums, it was intended to secure the lands out of which they were payable to the Company; but doubts

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having arisen on the subject, the Act of Parliament had passed in the fourth year of King James I., by which those doubts were removed; and that the lands became absolutely vested in the Company for their own use and benefit, subject only to the performance of that single charitable use, which, as they said, had been created by the will of Kneseworth, and which they had performed.

The defendants admitted, that since these grants had been made, they had applied very considerable parts of income derived from Kneseworth's estate to charitable purposes, more or less connected with or arising out of the purposes expressed in his will; but they said that they had done this, only out of a pious regard to the memory of Kneseworth, and not from any obligation to which they were subjected.

Mr. Temple, Mr. C. P. Cooper and Mr. O. Anderdon, in support of the information. * * *

[164] *Mr. Pemberton and Mr. John Romilly, contra.*

[The view of the case taken by the MASTER OF THE ROLLS, and afterwards by the LORD CHANCELLOR on the appeal, appears to render any report of the arguments of counsel unnecessary.]

Nov. 9. THE MASTER OF THE ROLLS:

[168] It appears to me that the effect of this statute of James I. was to vest in the Fishmongers' Company, for their own use, such lands or interests in lands mentioned in the letters patent of King Edward VI., as the Crown *was entitled to under the statute of the first of Edward VI.

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Now one of the purposes for which Sir Thomas Kneseworth directed the rents of his estate to be applied was the finding and maintaining an anniversary and obit for ever, and it was necessarily and properly admitted, that this was a superstitious use within the statute; and supposing that any part of the rents was to be applied to purposes not superstitious, the Crown, though it might not be entitled to the land, was, under the statute, entitled, in the nature of rent-charge, to such sums as in any one year during the preceding five years had been applied to purposes to be deemed superstitious under the statute.

It is to be observed that the three rents of 10s., 10s. and 10s. mentioned in the letters patent of Edward VI. are particularly

mentioned in the will as quit-rents to be paid by the receiver, and that, consequently, the 2*l.* 13*s.* 4*d.*, described as the sum which the Company had been accustomed to pay towards the perpetual support of two anniversaries for the soul of Sir Thomas Kneseworth, is all that in this instrument is described as the King's rent or annuity in respect of such application; and this I apprehend to be one of the points on which the relators principally rely, admitting, as they have properly done at the Bar, that the maintenance of anniversaries and obits was a superstitious purpose, and contending that the King never took, and was not entitled to take, more than was granted by these letters patent.

There is nothing to show what was the revenue arising from the estates in question, though, from the dispositions made by the will, it would seem probable that the income greatly exceeded the three quit-rents and the *2*l.* 13*s.* 4*d.*; neither is there any thing to show, whether King Edward VI. or Queen Elizabeth took any other part of the rents as rent-charges under the statute of Edward VI., although the Act of James I. may afford some reason for thinking that other compositions, besides that which was carried into effect by the letters patent, may have been made; but on the whole it appears to me, that any rent or payment to which the King was entitled as concealed, under the statute of Edward VI., and the land out of which the same was payable, was assured to the Company by the statute of James; and taking into consideration the effect of this Act, and also having regard to the nature of the present suit, which seeks to establish the trusts of Kneseworth's will and to carry them, and not any other trust created in any other manner, into execution, I think that the question to be determined in the cause is, whether the trusts of Kneseworth's will or any of them are good charitable trusts which have been violated by the defendants, and the execution of which ought to be and is now required to be enforced by the decree of this Court.

Soon after the statute of Edward VI. questions arose, sometimes upon the uses which were to be deemed superstitious within the statute, and more frequently upon the effect of the statute in giving to the Crown either the land the rents of which were to be applied to the uses, or only the sums of money which had been annually applied to the uses, and upon that subject some distinctions which may appear rather nice were made; but it seems to me that the case of *Adams v. Lambert*, as reported by Coke and by Moore, and several of the authorities there cited, and the case of *Pitts v.*

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James, as reported by Rolfe (1), and other cases stated in Duke *cannot be read without coming to the conclusion, that establishments or foundations for securing prayers for the souls of the dead were deemed to be superstitious and within the statute of Edward VI.; and upon these authorities I am of opinion that the directions of the will to which I have referred are such, that the payments made in respect thereof became the property of the Crown.

In the argument for the relators it was urged that the directions to which I have referred are only directions to pray for the souls of the dead, that such directions are not unlawful, and are not and never have been prohibited by the Church of England, and were not deemed to be superstitious at the time when the statute of 1 Edw. VI. was passed. It does not appear to me to be necessary, for the purpose of deciding this case, to enter into a minute examination of the doctrine of the Church of England respecting prayers for the souls of the dead; the question is, whether the uses to which the testator has directed his property to be applied in perpetuity are such as to vest the land, or the monies applicable to the uses directed by the will in the Crown, according to the intent and true effect of the statute of Edward VI.; and although prayers for the souls of deceased persons might not according to the doctrines of the Church of England be necessarily connected with the doctrine of purgatory, and although it might not be considered as an ecclesiastical offence to pray for the souls of deceased persons, or request others to do so (upon which points I do not think it necessary to express any opinion at this time), yet it might, nevertheless, as I conceive, be properly deemed superstitious to create an establishment or endow a foundation, to be continued in perpetuity and conducted with certain ceremonies supposed to be religious, for the purpose of securing the perpetual continuance *of prayers for the souls of the dead, either alone or in connection with other observances within the express terms of the Act; and it appears to me that the question has been determined by authority.

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There is nothing to show whether the sum of 100 marks was ever paid, but the gift of this sum for the better performance of the trusts above mentioned leads to an inference, that at the time, the rents were not more than sufficient to answer the purposes to which the testator directed them to be applied.

Even in the directions for making and renewing loans out of the

reserved fund the testator has intermixed directions for religious observances to be performed for the benefit of his soul and the souls of others, and the only charitable gift unmixed with superstition which I find in the will is that to the prisoners in Ludgate and Newgate. This might be sufficient to save the land from vesting in the Crown; but all the other applications directed to be made of the rents appear to me to be either gifts for superstitious uses, or to be so connected with superstition, or contrived for securing the continuance and perpetuation of the superstitious uses, that the rents payable and paid in that respect became the property of the Crown under the statute of Edward VI.; and, under all the circumstances of the case, I am of opinion that the estates devised by Kneseworth became the property of the Company, subject only to the performance of the trust for the prisoners of Ludgate and Newgate, which has been performed, and, therefore, that this information must be

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Dismissed with costs.

The relators appealed from this decree.

Mr. Cooper and Mr. Anderdon, in support of the appeal.

Sir W. Follett, Mr. Wigram, and Mr. Romilly, in support of the decree.

1840.
June.
1841.
Jan. 13.

On Appeal.
Lord
COTTENHAM,
L.C.

THE LORD CHANCELLOR:

[5 My. & Cr.
11]

The object of this information is to fix upon all the property derived by the Fishmongers' Company under the will of Sir Thomas Kneseworth the character of trust property, for charitable purposes, either those specified in his will, or other purposes *cy pres*, or, at least, to establish and provide for the charities so specified. *If it shall appear that Sir Thomas Kneseworth's will did not devote the property so given to charitable purposes, but gave it to the Fishmongers' Company, subject to and charged with certain payments for charitable or other purposes, the first and principal object of the information fails. In considering this point, the provisions for loans to members of the Fishmongers' Company must be kept distinct from the preceding provisions; for if, as in the case of *Attorney-General v. Smythies* (1), the

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preceding charities have only charges upon the property, and the property, subject to such charges, be given to some ultimate charitable purpose, such preceding charities are not entitled to participate in any increase of the funds.

The testator's will gives the property to the Fishmongers' Company, to the intent that they and their successors should keep, fulfil, and perform his will and intent, and every article thereof, as after declared and specified; which is not inconsistent with an intention that they should enjoy the property, subject to such performance of such his will and intent. He then directs that the property should be kept up and repaired, so as to produce an income equal to the payments and performance of his legacies and bequests; and, after giving such legacies, and providing for the audit of the accounts, imposes a fine upon the Company for neglecting the audit, to be levied out of the issues and profits of the property. He then directs that all the surplus rents and profits, after payment of all charges above rehearsed, should be laid in a chest in the treasury of the Company, and, together with 100 marks to be paid by his executors, applied for the purposes of repairing and new building the premises, and for the purposes of the loans; and, after providing for such *loans, directs that in default of the Company performing the directions of his will, his said legacy or bequest to the Company of his said lands should from thenceforth be void, and all their title and interest therein should cease and determine; and he, in that case, gave the same to the city of London, to the intent that they should perform all the directions of his will, except the directions as to the loans, and that the Fishmongers' Company, either rich man or poor man, should have no more profit of the issues of the said lands, but by the discretion of the Corporation of London.

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It is impossible to attend to these provisions of the will, and to entertain any doubt, but that, according to the principles of the cases of *Attorney-General v. Corporation of Bristol* (1), *Attorney-General v. Smythies* (2), and *Attorney-General v. Cordwainers' Company* (3), the gifts and directions in this will, which precede the provision as to the loans, are merely charges upon the property, and that, if they had been legal, those to whom the property is given subject to such charges would only be bound to discharge them as given, whatever might be the value of the property. I am

(1) 22 R. B. 136 (2 Jac. & W. 294). 717).

(2) 34 R. B. 192 (2 Russ. & My.

(3) 41 R. B. 120 (3 My. & K. 534).

also of opinion that the same principle applies to the provision as to loans to members of the Fishmongers' Company, although that is less definite as to the amount; and that if there had been no legal objection to that provision, all that the Company would have been bound to do would have been to furnish, out of the surplus rents, the accommodation intended. The Company were to have the benefit of the surplus of the property, subject to the observance of the testator's direction for the benefit of the poor members of it. This, though a charitable provision, was only the mode prescribed by the testator, *in which the Company were, in part, as amongst themselves, to enjoy the gift.

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So far, therefore, as this information seeks to fix upon the whole of the property derived by the Company from the will of Sir Thomas Kneseworth, I am of opinion that it has wholly failed. It has, however, a secondary and very subordinate object, viz. that of establishing and carrying into effect the object and directions of his will, in the several particulars which have been the subject of discussion. Much of the discussion turned upon the effect of the letters patent of 4 Edw. VI. and of the Act 4 Jac. I. The view I take of this case makes it unnecessary for me to follow that discussion further than to say that the effect of the two was, in my opinion, to give to the Company, for their own benefit (for there is no pretence for the suggestion, that what they took from the Crown was subject to any trust), all such interests in the property given by the will of Sir Thomas Kneseworth, as the Crown became, or might have become, entitled to, under the 1 Edw. VI. c. 14. But even that proposition is not very essential to the decision of the present case; for whether the Company so became entitled or not, it is clear that I cannot establish charities or carry into effect directions which are made illegal by the last-mentioned statute.

Of the objects attempted to be provided for by the will, two only have been supposed to be free from the operation of the statute. 1. That for the benefit of the prisoners in Ludgate and Newgate prisons: and 2nd, That for providing loans for members of the Company. Of the first, nothing need be said, as there is no case established of this provision having been neglected, and as there is no ground for contending that the Company were bound to increase the sum. *The only question is as to the second. The gift in the will is that, of the fund to be composed of the surplus rent and of the 100 marks, 10*l.* should be lent to every honest man of the fellowship for six months, but only upon certain conditions, viz. he

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laying a sufficient pledge in the treasury for the sure repayment thereof, and also saying five paternosters and five aves and a creed for the testator's soul, and the souls before mentioned; and if, at the end of the six months, the party borrowing wished to have the loan continued for six months more, he was to have the same for another six months, again laying a sufficient pledge for the sure repayment of the same, at the same half year, he saying *De Profundis*, or five paternosters, five aves, and a creed for the testator's soul and the souls before mentioned.

The fifth section of 1 Edw. VI. c. 14, gave to the King all lands given to the founding or maintenance of any anniversary or obit, or other like thing, intent, or purpose; and, by many decisions, referred to in *Adams v. Lambert* (1), it was decided that praying for souls was a like intent and purpose as an anniversary or obit, within the meaning of the Act, although not to be performed by a priest, or in any chapel; and that where the gift was for the benefit of the poor, but connected with such superstitious uses as their praying for souls, the whole went to the King. I particularly allude to the cases of *Adams v. Lambert* itself, and to the cases of *Caley* and *Gregory* and *Colborn v. Dale*, there cited in pages 114 a and 116 a. It is therefore impossible to maintain that this provision for the loans to members of the Fishmongers' Company was not within the operation of the Act 1 Edw. VI. c. 14. The King, therefore, became entitled to the whole estate; this purpose applying to the whole of the surplus rents, if required, and there being, therefore, no distinct part or portion which could go to the *King, in which case it was early decided that he was entitled to the whole; the authorities for which are also to be found in *Adams v. Lambert*. The result of which is, that the Company, by means of the letters patent and the Act 4 Jac. I., obtained all the title which the Act 1 Edw. VI. c. 14, would have given to the Crown; or, even if that were not so, that the gift was superstitious and void under the last-mentioned Act; and that the *Attorney-General*, therefore, cannot call upon this Court to establish it or carry its provisions into effect.

I therefore think that the decree of the MASTER OF THE ROLLS was perfectly correct, and

Dismiss this appeal, with costs.

(1) 4 Co. Rep. 104 b.

BUNBURY v. BUNBURY (1).

(2 Beav. 173—177; S. C. 9 L. J. (N. S.) Ch. 1.)

Necessary communications between a solicitor and client, through an unprofessional person, are privileged; but it not appearing in this case that the communications were wholly of a professional or confidential nature, such privilege was disallowed.

A case submitted since the institution of the suit, for the opinion of Dutch counsel, and the opinion thereon, held privileged.

1839.
Nov. 8.

Rolls Court.

Lord
LANGDALE,
M.R.

[2 Beav. 173]

THE facts of this case are stated in 49 R. R. 373, from 1 Beav. 818. The defendant by his answer admitted that he had in his possession the letters and documents set forth in the schedule, and which related to the matters in the bill mentioned; but as to some of the letters he said they had passed between him and Mr. Innes, his agent, "when the rights and interests of the defendant were in question, with reference to the institution and conduct of the aforesaid proceedings of the defendant in Demerara, and to the defence of the defendant in this suit; and that all such letters passed between the defendant and Mr. Innes, as the channel of communication between defendant and his solicitors and legal advisers in Demerara, and in this country, in the aforesaid proceedings and in this suit."

As to other letters he said, they "had passed between Mr. Innes, Mr. Pierce, Mr. Billingham, Mr. Smith, Mr. Lane, and Mr. Ross, after the death of the alleged testator, Hugh Mills Bunbury, when the aforesaid rights and interests of the defendant were in question, with reference to the institution and conduct of the aforesaid proceedings in Demerara;" and that all such letters passed between the said last-mentioned parties respectively, "as the channels of communication between the defendant and the other defendants and their solicitors in this country and their advisers in Demerara, in the aforesaid proceedings.

It was stated that Mr. Innes, Mr. Pierce, Mr. Billingham, Mr. Lane and Mr. Ross were merchants in London, *Demerara, and St. Vincent respectively, and that Mr. Smith was the plaintiff's counsel in Demerara.

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A motion was now made for the production of all the documents admitted to be in the defendant's possession.

Mr. Pemberton, Mr. G. Richards, and Mr. L. Wigram, in support of the motion [cited *Storey v. Lord John George Lennox* (2),

(1) *Ross v. Gibbs* (1869) L. R. 8 Eq. 644, 45 L. J. Ch. 449, 35 L. T. 76.
522, 39 L. J. Ch. 61; *Anderson v. Bank* (2) 43 R. R. 248 (1 My. & Cr. 537).
of *British Columbia* (1876) 2 Ch. Div.

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and *Bolton v. The Corporation of Liverpool* (1)]. No such necessity exists for communicating between a party and an unprofessional person, and in such case there is no such privilege. Privilege has never been extended beyond communications between a party and his professional adviser.

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(THE MASTER OF THE ROLLS: I think it has been extended to the case of an interpreter (2). Suppose *an illiterate man, unable to write, employed a person to write to his solicitor for him, would not such a communication be privileged?)

Here no such necessity appears to have existed; besides which, these communications are not stated to have been of a professional nature; they may refer to matters quite foreign to the relation of solicitor and client. [They also cited *Hughes v. Biddulph* (3), *Desborough v. Rawlins* (4), *Greenlaw v. King* (5).]

Mr. Kindersley and *Mr. George Turner*, *contrà*, contended that the letters were privileged, though addressed to unprofessional persons, inasmuch as such parties formed the medium of communication between the client residing in England and his solicitor in the colonies. They relied principally on the case of *Walker v. Wildman* (6), where letters which had passed between the defendant's son and her solicitor were held privileged, Sir JOHN LEACH observing, "that the protection was the same whether the client communicated directly with his professional adviser, or through the intervention of a third person." They also cited *Greenough v. Gaskell* (7).

Nov. 8.

THE MASTER OF THE ROLLS:

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In this case it fortunately happens that there is no doubt respecting the rule which the Court acts upon: it is conceded that an admission in an answer, such as occurs in the present, puts the defendant upon showing *that he is exempted from the production of the documents, and it is fully admitted, that any professional confidential communications which may have taken place between a party and his solicitor are also to be protected.

I believe that the case of *Walker v. Wildman* (6) has never been in any way disputed, and I have some recollection of a case

(1) 36 R. R. 251 (1 My. & K. 88).

(2) See *Du Barré v. Livette*, 3 R. R. 655 (1 Peake, 108).

(3) 28 R. R. 46 (4 Russ. 190).

(4) 45 R. R. 320 (3 My. & Cr. 515).

(5) 49 R. R. 310 (1 Beav. 137).

(6) 22 R. R. 234 (6 Madd. 47).

(7) 36 R. R. 258 (1 My. & K. 98).

in which the principle there acted upon was carried still further; it certainly appears to me that there may be very many cases in which a party, not being able himself to have a direct communication with his solicitor, is compelled to employ an intermediate agent for the purpose of thus effecting a communication of matters of a confidential nature. In such cases the necessity, which arises, of transmitting such communications through another party, renders it privileged. The question is, whether the defendant in this case has protected himself within any rule of that kind which prevails, and I am of opinion that he has not. He relies upon this,—that Mr. Innes was the channel of communication between him and his solicitor. He might have been so, and yet a considerable part of the communications made by him through Mr. Innes might not, in any sense, be considered as professional or confidential communications to be transmitted through Mr. Innes to the solicitor. It is upon that ground, and upon that ground alone, that I think I must order the production of the letters.

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BUNBURY.

A case “ which, since the institution of this suit, had been stated on behalf of the defendants for the opinion of counsel in Holland, as to the rights and interests of the defendants, and stated with reference to their defence in this suit, and the opinion of counsel upon such case,” were held by the MASTER OF THE ROLLS to be privileged, and their production was refused.

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JAMES v. DURANT (1).

(2 Beav. 177—179; S. C. nom. *James v. James*, 9 L. J. (N. S.) Ch. 85.)

On the marriage of a lady, who was possessed of funded property and shares in water works, the funded property alone was settled; the settlement, however, contained a recital of an intention, that all property which the wife or her husband, in her right, should after the marriage become entitled to, should be settled on similar trusts, and a covenant by the husband and by the wife, that all property which she or her husband, in her right, should after the settlement become entitled to should be settled: Held, that the shares were subject to the trusts of the settlement.

1839.
Dec. 24.
Rolls Court.
Lord
LANGDALE,
M.R.
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At the time of the marriage of Mr. and Mrs. James the latter was possessed of certain funded property, and some shares in the South London Water Works.

By the settlement made on their marriage, dated in 1816, after

(1) Questioned by WICKENS, V.-C., in *In re Clinton's Trust*, L. R. 13 Eq. 295, 41 L. J. Ch. 191, 26 L. T. 159.

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v.
DURANT.

reciting that Mrs. James was entitled to the funded property (but omitting all mention of the shares), and reciting that it had been agreed "that the funded property and all other personal estate and effects of the said Maria Heathcote, which she or any person or persons in trust for her, or the said William James in her right, should at any time during the marriage become entitled to, exceeding in amount or value in any one gift or bequest the sum of 200*l.* and not otherwise," should be assigned to the same trustees, upon the trusts therein mentioned; and reciting that the funded property had been transferred into the names of the trustees; the trusts of the funded property were declared to be for the benefit of the husband, wife and children.

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The settlement contained a covenant on the part of Mr. and Mrs. James, that in case Mrs. James, "or any person or persons in trust for her, or the said William James in her right, should at any time or times thereafter during their joint lives become possessed of, interested in, or entitled to any sum or sums of money or other personal property, estate or effects whatsoever, exceeding in amount or value the sum of 200*l.* sterling at any one time, under or by virtue of any deed, will or other instrument, or otherwise howsoever, then and in every such case the same sum or sums of money, or other personal property, estate or effects so exceeding in amount or value the sum of 200*l.* sterling should be from time to time paid, assigned and transferred; and that they the said Maria Heathcote and William James should, from time to time as and when such right, title or interest should accrue, or with all convenient speed thereafter, pay or cause or procure or otherwise permit and suffer to be paid, and well and effectually assign and transfer the same sum and sums of money or other personal property, estate or effects" unto the trustees, upon the same trusts as those declared of the funded property.

The question in this case was, whether the South London Water Works shares, which exceeded the value of 200*l.*, were comprised in this covenant.

Mr. Tinney and Mr. Loftus Wigram, for the plaintiffs.

Mr. Pemberton and Mr. Roupell, for the husband, contended that he was entitled to all property possessed at the time of the marriage which was not expressly comprised in the settlement, and that the covenant was to extend only to future acquired property.

Mr. G. L. Russell, for the trustees.

Graffley v. Humpage (1) was cited.

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v.
DURANT.
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I think that these shares are subject to the trusts of the settlement, and I do not know how it is possible to construe the words in any other way. The marriage took place, and by virtue of that marriage the husband instantly, in his wife's right, acquired a title to the property in question. It seems then to me, that the case comes precisely within the words, and that the shares became subject to the trusts of the settlement.

Rarely are settlements entered into with such prudence as to fully carry into effect the actual intention of the parties, and where recitals are made in these general words I am afraid that their effect cannot be avoided, otherwise than by enumerating in the settlement itself any particular portion of the wife's property which it is intended shall not be subjected to the trusts.

TRAVERS *v.* TRAVERS.

(2 Beav. 179—180.)

1840.
Feb. 20.

Rolls Court.
Lord
LANGDALE,
M.R.
[179]

In a marriage settlement the husband alone covenanted to settle any property which his wife or he in her right might thereafter acquire: Held, that the property which was afterwards given to the wife for her separate use was not affected by the covenant.

On the marriage of Mr. and Mrs. Smith, certain property to which Mrs. Smith was then entitled was settled on the usual trusts for the benefit of the *husband, wife and children; Mr. Smith alone covenanted to settle any property to which his intended wife or he, in her right, might become entitled during the coverture.

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The father of Mrs. Smith subsequently, by his will, gave a portion of the income of his residuary estate to Mrs. Smith for her separate use.

The question was, whether certain arrears of this income, now in Court, ought to be paid over to the trustees and invested by them upon the trusts declared in the settlement, or whether Mrs. Smith was entitled to have the amount at once paid over to her.

(1) 49 E. R. 284 (1 Beav. 46).

TRAVERS
v.
TRAVERSS.

Mr. Tinney, Mr. Pemberton and Mr. E. Teed, for different parties.

The MASTER OF THE ROLLS was of opinion that the fund in question was not comprised in the settlement, and ordered payment to Mrs. Smith.

1839.
Nov. 12.

Rolls Court.

Lord
LANGDALE,
M.R.

[180]

TAYLOR v. BROWN (1).

(2 Beav. 180—184; S. C. 9 L. J. (N. S.) Ch. 14.)

Where time is not of the essence of the contract, and there is unnecessary delay by one of the parties in completing, the other has a right, by notice, to limit the time for completing the contract, and upon default to abandon the contract.

A bill was filed by a vendor for the specific performance of a contract: the purchaser insisted that the contract had been abandoned: failing in this defence he was ordered to pay the costs of the suit up to the hearing, and the usual reference was made as to title.

In 1834 the defendant became the purchaser of certain freehold property belonging to the plaintiffs. The sale was by auction, subject to certain conditions, with respect to which it is sufficient to observe that time was not made of the essence of the contract, and that *some delay was thereby anticipated in consequence of the residence of some of the vendors in Canada. It was stipulated, however, that if it should be necessary to send the conveyance to Canada, the execution by the parties should be obtained with all reasonable despatch.

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The abstract was furnished and submitted for the opinion of the defendant's conveyancer; this being obtained, various communications took place between the parties, the plaintiffs endeavouring to comply with the requisition; and in order to remove the objections raised, considerable delay occurred in sending to Canada and in obtaining the requisite evidence. This, however, was not objected to on the part of the defendant until the time after stated.

The conveyance was executed, and in March, 1836, the answers to the remaining requisitions of counsel and further evidence and documents were furnished by the plaintiffs, and were submitted on the part of the defendant to his conveyancer. After this, frequent applications were made on the part of the plaintiffs to the defendant's solicitor, urging the completion of the contract, and some

(1) *Green v. Sevin* (1879) 13 Ch. D. 589, 49 L. J. Ch. 166, 41 L. T. 724.

threats were held out of filing a bill for specific performance. Nothing satisfactory was done by the defendant until the 2nd of July, when the further opinion of his conveyancer was furnished. Upon this, the vendors' solicitor obtained the further opinion of his counsel, and for the satisfaction of the defendant occupied himself in procuring the further evidence suggested by him. In this state of things, the defendant, on the 13th of July, 1836, abruptly insisted on terminating the contract by a letter written to the vendors' solicitor in the following terms: "As you state that the most satisfactory evidence of the facts mentioned in certain requisitions that can be furnished has been recently *obtained from Canada, and have referred to documents B. as affording that evidence, and as my counsel is of opinion that these documents are not a sufficient compliance with the requisitions, I beg to inform you that I consider the agreement as at an end, and I request you to take notice thereof."

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v.
BROWN.

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The vendors afterwards attempted to supply further evidence, but the defendant repeated his determination of abandoning the contract.

The vendors then filed this bill against the purchaser for a specific performance of the contract; by his answer the defendant still insisted that the contract had been abandoned, and also that the plaintiffs had not established their title to the property.

Mr. Pemberton and *Mr. Lloyd*, for the plaintiffs, asked for the usual reference to the Master as to the title; and they contended, that as the defendant had set up as a defence the abandonment of the contract, in which he had wholly failed, he alone had been the cause of all the litigation; that the defendant by the mode of his defence had also prevented the plaintiffs from obtaining, on an interlocutory application, the usual reference to the Master on the title, and consequently ought to pay the costs of the suit up to the hearing; they cited *Scoones v. Morrell* (1).

Mr. Kindersley and *Mr. Spencer Follett*, *contrà*, contended that the contract had been put an end to by the letter of the 13th of July, and that such a delay had occurred on the part of the vendors as warranted that proceeding.

THE MASTER OF THE ROLLS:

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The question which has been discussed in this case is, whether

(1) 49 R. R. 351, 1 Beav. 251.

TAYLOR
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BROWN.

the defendant remains under any obligation to perform the agreement. He says he does not, and that he has ceased to be under any obligation from the 13th of July, 1836. Now as I have before stated, where the contract and the circumstances are such that time is not in this Court considered to be of the essence of the contract,—in such case, if any unnecessary delay is created by one party the other has a right to limit a reasonable time within which the contract shall be perfected by the other. It has been repeatedly so considered in this Court; and where the time has been thus fairly limited, by a notice stating that within such a period that which is required must be done or otherwise the contract will be treated as at an end, this Court has very frequently supported that proceeding; and bills having been afterwards filed for the specific performance of the contract, this Court has dismissed them with costs (1).

This, however, is not a case of that description, for though I do not mean to say that the defendant might not at various periods of this transaction have given such a notice, yet he has not done so; for what happened, as I understand it, was this, that on the 2nd of July, 1836, the defendant's solicitors sent Mr. Palmer's opinion that the requisition had not been complied with, and under circumstances which amounted to a demand of further explanation; and further explanation being given and being in the course of being obtained, on the 13th of July, 1836, the letter is sent, saying, from this time and on this very day I shall consider the contract at an end. Under these circumstances I think the

[*184] *defendant is still under an obligation to perform the contract. The decree will be, that upon showing a good title the contract must be performed.

The only other question is, who is to pay the costs of the litigation up to this time? The litigation up to this time is not whether a good title has been shown, but whether that letter of the 2nd of July, 1836, did or did not put an end to the contract; I am of opinion that it did not; and all the litigation and expense up to this time has been occasioned by the defendant's insisting upon that which he was not entitled to, and having wholly failed in the defence, I think, the defendant must pay the costs of the suit up to the hearing.

(1) *Watson v. Reid*, 32 R. R. 203 (1 Russ. & My. 236).

ATTWOOD *v.* BANKS.

(2 Beav. 192—200; S. C. 9 L. J. (N. S.) Ch. 99; 4 Jur. 100.)

A creditor cannot commence proceedings in bankruptcy against his debtor where such proceedings are inconsistent with an arrangement under which the debtor will be entitled to be released from his debt at a future time.

THE plaintiff carried on business as a glass manufacturer in partnership with the defendant Hart, and he also carried on business as an alkali and soap manufacturer in partnership with the defendants Tulk and Banks. Articles of partnership between them had been prepared but not executed.

The partnerships became indebted to their bankers, Messrs. Ridley & Co., (who were also defendants,) to the extent of 33,000*l.*, which was secured by mortgages, bonds and policies. The partners did not agree amongst themselves, and an arrangement was made, which appeared to have been brought about by the bankers themselves, whereby the plaintiff was to retire from the two firms on the 27th of April, 1839; and the plaintiff and the defendants Hart, Tulk and Banks, entered into an agreement, by which it was stipulated that the partnerships should be dissolved, that the partnership property of the alkali and soap works should be transferred to Tulk, and of the glass works to Hart; "that all accounts and reckonings by and between the parties, including Banks, should be considered as settled and adjusted; and that mutual releases should be given; that the continuing parties should pay off, in due course, all joint debts, and discharge all joint liabilities and demands, actions, suits and legal proceedings against the firms or the partners or any of them in respect thereof, as the *same appeared by the books of the said partnership, or in such cases as where the accounts were not yet delivered: and to release and guarantee the plaintiff therefrom;" and it was further stipulated as follows: "The bankers, at the end of three months from the date hereof, to release the said Attwood (the plaintiff) from all liability on account of the debts due to them, including the mortgages, bonds and assignments of life policies."

Messrs. Ridley & Co., who had united themselves in business with a district bank, assented to the agreement of the 27th of April, 1839, and one of the partners of the firm of Ridley & Co. signed a memorandum thereon, acceding to and confirming the agreement so far as they and the district bank were concerned.

Differences arose, not only as to what was to be considered

1839.
Dec. 23.*Rolls Court.*Lord
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partnership property to be transferred to the continuing partners under this agreement, but also with respect to the partnership liabilities, and in September, 1839, the plaintiff filed his bill for the specific performance of the agreement of the 27th of April, 1839.

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In the month of November following the bankers, notwithstanding their assent to and confirmation of the agreement, took proceedings under the statute for the abolition of imprisonment for debt (1), to make the plaintiff and his co-partners bankrupts, and accordingly they filed an affidavit of debt, and served the plaintiff with a copy of the affidavit and with notice requiring immediate payment of such debt. The effect of this was, that if plaintiff did not within twenty-one days, pay or secure the debt, or give such security as a commissioner *of the Court of Bankruptcy should approve of to pay or render himself into custody, he would have been deemed to have committed an act of bankruptcy on the twenty-second day after service. In consequence of this the plaintiff filed a supplemental bill against the bankers, the district bank and his three former partners, praying an injunction to restrain the bankers from doing any act, &c., whereby or by reason or means whereof the notices, affidavits and other proceedings in the supplemental bill mentioned, or the non-payment of the debt, or not securing the same might be or be brought forward against the plaintiff as the means or proof, or in or towards the proof, of his having committed or being, under or in reference to the provisions of the Act of Parliament mentioned, deemed to have committed an act of bankruptcy.

Mr. Pemberton, Mr. Girdlestone and Mr. Simpson, for the plaintiff:

The bankers having concurred in and confirmed the agreement, and having thereby undertaken to release the plaintiff from all liability, it is most unequitable in them to take advantage of the debt which they have agreed to release, in such a way as to cause the plaintiff to be made a bankrupt thereon, especially as on the faith of the agreement the plaintiff has given up all right to the partnership assets, out of which the payment ought to be made. If the plaintiff does not find security for the whole debt, which, from its great amount, it will be very difficult to do, then by the terms of the Act of Parliament he will be considered to have committed an act of bankruptcy, and any other creditor may then take

(1) 1 & 2 Vict. c. 110, s. 8. [Rep. 32 & 33 Vict. c. 83, s. 20.]

advantage of it; the Court of Bankruptcy would then have no jurisdiction to interfere and prevent a commission issuing on the ground of *there being no debt: *Ex parte Lanchester* (1); this would work an irreparable injury to the plaintiff, which this Court should prevent by injunction. That it has jurisdiction appears from the cases of *Beckford v. Kemble* (2), where the Court restrained a mortgagee from proceeding in the Courts in Jamaica to a foreclosure, and *Gascoyne v. Chandler* (3), where an injunction was granted to restrain proceedings in the Ecclesiastical Court, to set aside a will contrary to an agreement between the parties.

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Mr. Kindersley and *Mr. Gordon*, *contrà*, contended that this Court had no jurisdiction to entertain an application of this description, and that no instance could be adduced of this Court having by injunction interfered with the issuing of a commission of bankruptcy. That the Court of Bankruptcy, as constituted by the 1 & 2 Will. IV. c. 56, was "a court of law and equity" (4), and was therefore fully capable of doing justice between the parties, and of taking into consideration the equitable grounds of objection here suggested by the plaintiff, and if there appeared to be no debt that Court would interfere and prevent an adjudication, as in the case of *Ex parte Fletcher* (5).

That this Court would not restrain proceedings in another court of equity, where it was shown that the latter had full jurisdiction and the means of doing justice between the parties.

(THE MASTER OF THE ROLLS: Not long since I myself had occasion to grant an injunction to restrain proceedings in the Equity Exchequer (6).)

*They further contended that there appeared no sufficient consideration for the agreement, and that the bankers were justified in obtaining security for their debt.

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(1) 1 Rose, 220.

(2) 24 R. R. 143 (1 Sim. & St. 7).

(3) 3 Swanst. 418, n.

(4) Sect. 1. [Rep. 32 & 33 Vict. c. 83, s. 20.]

(5) 2 Dea. & Ch. 90.

(6) *Boulter v. Boulter*, Rolls, 7 and 12 Dec., 1838, in which, there being

a suit in this Court involving mortgaged property, a mortgagee had assented to a sale; and there being some delay in the proceedings, he afterwards filed a foreclosure bill in the Exchequer, which the MASTER OF THE ROLLS, after argument, restrained him from prosecuting.

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Mr. Pemberton, in reply.

THE MASTER OF THE ROLLS:

This is undoubtedly an application of the first impression, and it must necessarily be so, because the mode of proceeding which is here complained of was first sanctioned by the Act which very recently passed for abolishing imprisonment for debt in certain cases.

It is clear that the agreement which seems to have been entered into between the plaintiff and his partners was not, of itself, a sufficient protection to him, because, whatever his partners might agree to, they could not exonerate him from the demands which the creditors of the concern had against all the partners individually, and therefore it was, that before this agreement could be finally concluded application was made to the bankers; they quite concurred with the plaintiff's partners in the course intended to be pursued; and they signed a memorandum indorsed on the agreement in these words: "We accede to and confirm this arrangement, so far as we and the district bank is concerned." The bankers having confirmed the agreement, it then appeared [*197] safe enough for the plaintiff to act upon it; and *he thereupon relinquished the possession of the partnership property to the continuing partners and retired; if no dispute had afterwards arisen among the partners there would probably have been no question with the bankers.

It appears, however, that after this agreement had been signed differences arose between the partners; and in the month of September, 1839, the plaintiff filed his bill for a specific performance of the agreement, and offering of course to do every thing that remained on his part to be done, to give up all his claim to the partnership property, and calling on the continuing partners to exonerate him from all the partnership liabilities.

Very shortly after this Messrs. Ridley & Company seem to have thought that they might act just as if they had never confirmed this agreement between the partners, and that they were entitled to treat Mr. Attwood as their creditor, in the same way as if they had never agreed to exonerate him and to accept the liability of the continuing partners. Accordingly they take these proceedings against him with a view of making or procuring Mr. Attwood to be made a bankrupt, upon the footing of the debt comprised in the agreement which they had confirmed, and by which the other

partners agreed to exonerate him; the consequence was that this supplemental bill was filed, praying that they might be restrained from that course of proceeding. To this bill, the bankers and Mr. Tulk and Mr. Banks, who were partners, and Mr. Hart, a partner with Mr. Attwood in the other firm, were made parties: they have filed demurrers, and demurrers have been filed on the part of persons representing the district bank. I do not, however, think that these demurrers can be sustained for want of equity, or on the ground of multifariousness, or on any ground *whatever, unless they can be sustained upon this, that this Court has no jurisdiction to interfere. I think the whole statement of the facts shows that an unjust attempt is made to use that debt in violation of the agreement; and, therefore, the motion, as well as the demurrers, depends on the single question whether this Court has jurisdiction.

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When new modes of proceeding are introduced into courts of justice, it usually happens that attempts are made to take advantage of them and to apply them in a way very different from what was intended; in short, a new weapon,—a new power is put into the hands of persons who, when they find they can do so, are inclined to make an improper use of it. Every attempt of that sort must necessarily give rise to an application of the first impression in courts of equity; fortunately, however, courts of equity act on general principles, and if they find parties taking an unfair advantage of such new proceedings, this Court will interpose the jurisdiction which it undoubtedly possesses, and prevent that unconscionable mode of proceeding.

Here the bankers have agreed to accept other persons as their debtors, and by that agreement the plaintiff has been induced to give up his share in the partnership property, and to transfer it to the separate possession of those who were to sustain the liability: in short, he has been induced by the act of the bankers themselves to denude himself of the means of payment, and to place those very means in other hands. Is it not against conscience for those who have induced him to do so to proceed against him in that unprotected state, and to demand against him the same right as if they had never caused him to adopt that course of proceeding? I cannot doubt but that this is an unequitable proceeding. It *is said, however, on the part of the defendants, that this Court ought not to exercise a jurisdiction, because the Court of Bankruptcy has jurisdiction. I was much surprised at the way in which that

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argument was conducted. It seems to be conceded, that the Court of Bankruptcy, in the present state of things, has no power whatever to interfere; the only thing the Court of Bankruptcy can do, is to determine the security to be given for answering any sum which may be recovered in an action: the Court of Bankruptcy has not, in the present state of things, any jurisdiction beyond that. But then it is said, "Let this matter go on,—let these parties proceed,—let them avail themselves of this particular debt, from which they agreed to exonerate the plaintiff, so far as to sue out a fiat in bankruptcy, and then the commissioners will have jurisdiction to determine whether there is a valid or sufficient petitioning creditor's debt." True, that after the fiat is issued they may have power to consider as to the validity of the debt; but is that a reason why the parties should be allowed to proceed on this debt so far as to sue out the fiat? I concur in the other argument which has been used, that there never was an instance of an application of this kind before; there could not have been such a thing before as an application to a court of equity to prevent a party suing out a fiat in bankruptcy, nor do I think any injunction for that purpose could be granted. The only question is, whether the Court has jurisdiction to say that these parties, having entered into this agreement with respect to this particular debt, are afterwards entitled to use it for the purpose of proceeding to take out a fiat of bankruptcy against the plaintiff. I have no doubt in my mind as to the jurisdiction of the Court to interfere; if there is any difficulty it is in framing the particular order. The words ought to be, to the effect of restraining the parties from adopting any proceeding *whereby, or in consequence whereof, Mr. Attwood may be deemed under the provisions of that Act of Parliament to have committed an act of bankruptcy by not giving security for this particular debt: that is the only protection the plaintiff is entitled to. If the proceeding which has already taken place is to be deemed an act of bankruptcy to support a fiat issued by any other person, I cannot protect the plaintiff from it. As to the demurrers, they must be overruled.

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1840.
Jan. 23.

Rolls Court.

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WEDDERBURN v. WEDDERBURN.

(2 Beav. 208—214; S. C. 9 L. J. (N. S.) Ch. 205; 4 Jur. 66.)

[For the report of this case on appeal, taken from 4 My. & Cr. 585, see 48 R. R. 181.]

MARTIN *v.* DRINKWATER.

(2 Beav. 215—219; S. C. 9 L. J. (N. S.) Ch. 247.)

A testator bequeathed to Mrs. L. Pitney an annuity of 150*l.*, payable half-yearly, for her separate use. He afterwards wrote in the margin opposite this bequest: "Now, Mrs. J. Gray, one hundred guineas per annum, in quarterly payments." Mrs. L. Pitney had married a Mr. Gray, prior to the date of the will: Held, that the annuities were substitutional, and that the legatee was entitled to an annuity of 100 guineas for her separate use.

Extrinsic evidence is admissible to show the circumstances of the testator at the time of making his will, so as to enable the Court to place itself in the situation of the testator; but it is inadmissible to prove either his motives or intentions.

THE question was, whether two annuities given by the will of the testator were, under the circumstances, cumulative or substitutional.

It appeared that the testator F. P. Martin, by his will, dated the 16th of August, 1816, bequeathed as follows: "I give to

"Now, Mrs. Jane Gray, one hundred guineas per annum, in quarterly payments. 31st Dec. 1816.

"F. P. MARTIN."

Mrs. Louisa Pitney, of Marchmont Street, Brunswick Square, one annuity or clear yearly sum of 150*l.*, for and during the term of her natural life (in addition to 60*l.* per annum, in the Imperial Annuities, and the house which I

gave to her some time ago), which annuity of 150*l.* I direct shall be paid to her half-yearly, the first half-yearly payment thereof to commence and be made at the end of six calendar months next after my decease, and shall not be subject to the debts, control, or engagements of any husband, but shall be paid into her own hands for her separate use, or to such person or persons as she shall, by writing under her hand, appoint to receive the same; and her receipts alone, notwithstanding her coverture, or the receipts of the person or persons so to be appointed to receive the same, shall be sufficient discharges to my executors; and it is my will that she shall not sell, mortgage, or otherwise dispose of the same annuity, it being my intention to secure to her a permanent annual income; and if she shall attempt to *sell, mortgage, or otherwise dispose of the same, it shall thenceforth cease and be no longer payable."

The marginal words were in the testator's handwriting, and were proved in the Ecclesiastical Court as a testamentary writing. Janet Angus, under the name of Louisa Pitney, had cohabited with the testator until his marriage in 1808, when he made a provision for her; and in 1814 she married a Mr. Gray.

1840.

Feb. 26.

Rolls Court.

Lord
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The testator died in 1818.

The question which now arose, upon exceptions to the Master's report, was, whether the annuities of 150*l.* and of 100 guineas, bequeathed by the will and codicil of the testator, were cumulative or substitutional.

Mrs. Gray claimed the two annuities for her separate use, and her husband claimed the annuity of 100 guineas unaffected by that restriction: he also insisted that the annuity of 100 guineas was not given for life, but was a permanent annuity unlimited in duration.

The annuity of 100 guineas alone had been paid since the testator's death in 1818.

Some evidence was produced to show that, towards the close of the year 1816, the testator was informed that Mrs. Pitney had married a person named Gray, when the testator replied that she had acted very foolishly, and that she ought now to be maintained by her husband, or words to that effect. This evidence was objected to as inadmissible.

Mr. Pemberton and *Mr. Calvert*, for the residuary legatee, contended that the annuities were substitutional.

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Mr. Kindersley and *Mr. Blunt*, for Mrs. Gray, contended that the legacies, being given by two different instruments, being of unequal amount, and payable at different periods, were cumulative.

Mr. Tinney and *Mr. Willcock*, for Mr. Gray, contended that the annuity of 100 guineas was not given to the wife's separate use, and belonged to the husband.

Mr. G. Richards and *Mr. Stevens*, for the defendant Drink-water.

[*Mackenzie v. Mackenzie* (1), *Hurst v. Beach* (2), *Campbell v. The Earl of Radnor* (3), *Curry v. Pile* (4), and other cases were cited.]

THE MASTER OF THE ROLLS:

The question in this case arises on the construction of the will, and of a testamentary writing, which, having been proved as a codicil, must therefore be taken in connection with the will. The

(1) 26 R. R. 64 (2 Russ. 262).
(2) 21 R. R. 304 (5 Madd. 351).

(3) 1 Br. C. C. 271.
(4) 2 Br. C. C. 225.

facts of the case are very short. It appears that the person who is now called Mrs. Jane Gray cohabited with the testator until his marriage, when he made a provision for her, which she was in the enjoyment of at the time he made his will. By his will, dated in August, 1816, he made the bequest in question; and in December following he wrote opposite the word "Pitney," in the will, this marginal note, which has been proved as a codicil: "Now, Mrs. *Jane Gray, 100 guineas per annum, in quarterly payments. 31st of December, 1816." Having been proved as a codicil, it has been argued that there are two distinct gifts bequeathed by two distinct instruments, and that the rule as to cumulative legacies must be applied to this case. If the instruments are to be taken separately, then undoubtedly the argument offered on behalf of the legatee would prevail; but I cannot so consider them, nor can I construe the latter words except with reference to their position in the margin of this will, and by uniting them with the words contained in the body of the will; for what is the meaning of "Now, Mrs. Jane Gray, 100 guineas, &c.?" Nothing can be made of these words unless we look at the opposite words in the will, namely, "Mrs. Louisa Pitney." When we are thus obliged to refer to the will, we must consider what is the meaning of the words of the codicil when introduced into the will. The will says, I give Mrs. Louisa Pitney an annuity of 150*l.*; and, introducing the words in the margin, the gift will stand, I give Mrs. Louisa Pitney, now Mrs. Jane Gray, 100 guineas per annum; thus constituting one gift only. I come to this conclusion without going into the matters of evidence which have been produced. I consider the rule as settled: you are at liberty to prove the circumstances of the testator, so far as to enable the Court to place itself in the situation of the testator at the time of making his will, but you are not at liberty to prove either his motives or intentions. There can be no doubt as to the rule on this point, and therefore, without reference to the evidence which has been produced, I consider that these words are incapable of any rational construction, except in connection with the words in the will; and it appears to me that the testator's object was to vary the legacy given by the will, and to convert it from an annuity of 150*l.*, payable half-yearly, into an *annuity of 105*l.*, payable quarterly. I conceive also that the other limitations contained in the will respecting the annuity of 150*l.*, are now applicable to the substituted annuity of 105*l.*

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1839.
Nov. 22.

LARKINS v. PAXTON.

(2 Beav. 219—220.)

Rolls Court.

Lord
LANGDALE,
M.R.

[219]

In 1811, a creditor's suit was instituted by a simple contract creditor; the answers were got in in 1820, the plaintiff's debt was admitted, and thereupon the assets were brought into Court; in 1823, another simple contract creditor obtained judgment against the executors, no decree was made in the cause until 1829: Held, that the judgment thus obtained had priority over all the simple contract debts.

THIS was a creditor's suit instituted to administer the estate of the testator, and was commenced by a simple contract creditor in 1811.

The answers were not got in until 1820; the plaintiff's debt was admitted by the executors, and the fund was then paid into Court; no decree was, however, made until 1829.

In the mean time, and in Easter Term, 1823, a Mr. Theobald, a simple contract creditor of the testator, obtained judgment by confession against the executors for 1,761*l.*: this sum exceeded the amount of assets, and the question was, whether the judgment debt was to have priority over the simple contract debts of the plaintiff and the other creditors of the testator, which were very considerable in amount.

Sir W. Riddell, for the plaintiff, contended that the judgment-creditor had no such priority over the plaintiff and the simple contract creditors, the judgment having been obtained after the bill had been filed in this Court, and after an admission by the executors of the plaintiff's debt. * * *

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Mr. Chandless, *contra*, for the judgment-creditor, was not called on by the COURT.

THE MASTER OF THE ROLLS:

I do not think I can deprive the creditor of the benefit of his judgment, looking at the circumstances. Here is a bill filed in the year 1811, the answers not got in until the year 1820, no decree obtained till the year 1829,—eighteen years from the time when the bill was filed, until the time when the decree was obtained, and no reason is suggested why there was all this delay, or why there was any difficulty in procuring the administration of the estate at an earlier period; in the mean time a creditor brings an action, and in 1823 obtains judgment; and the question is, whether I am to

allow priority to the judgment so obtained, or whether I am, after the plaintiff's negligent and dilatory conduct of his suit, to deprive another party, who is a creditor, of the diligence he has used? I think I cannot.

LARKINS
*
PAXTON

BLEASE v. BURGH.

(2 Beav. 221—228; S. C. 9 L. J. (N. S.) Ch. 226.)

1840.
March 11, 16.

Rolls Court.

Lord
LANGDALE,
M.R.

[221]

Under a testamentary gift to a class of children which postpones payment until they attain 23, a child born after the death of the testator and before any child attains 21, is a member of the class.

A gift in terms importing a present vested interest with a postponed time of payment, is not made contingent by a direction to accumulate till the time of payment arrives.

THE testatrix, Alice Savignac, by her will dated the 1st of July, 1805, gave the residue of her estate to trustees, on trust, to collect, sell and invest the same, and to invest and accumulate the interest thereof, and to stand possessed of the trust funds and all the accumulations thereof "in trust for all and every the child and children of her son John Blease by his wife Elizabeth, other than Thomas Seddon Blease, in equal parts, shares and proportions, if more than one, and if but one, then for such only one, and to be paid, assigned or transferred to him, her or them, being a son or sons, on attaining the age of twenty-three years; and being a daughter or daughters, at the like age of twenty-three years or day or days of marriage, which should first happen; and in the event of the death of any or either of such children, being a son or sons, under the said age of twenty-three years, or being a daughter or daughters, under the like age, and without having been married, then the part or share, or parts or shares, of him, her, or them so dying to be paid, assigned, or transferred to the survivor or survivors of them; and in case all the said children of her said son John Blease, other than and except the said Thomas Seddon Blease, should die under the said age of twenty-three years, *being a son or sons, or the like age or day or days of marriage, being a daughter or daughters, then, upon trust, to pay, assign or transfer such stocks, funds or securities in or upon which the rest, residue and remainder of her estate, property and effects should or might be invested, and all accumulations thereof, unto her said grandson Thomas Seddon Blease, on attaining his said age of twenty-three years; and in case of his death under such age of twenty-three years, as well as all the other children of her said son John Blease

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under the age of twenty-three years, being a son or sons, and under the like age and without having been married, being a daughter or daughters, then, upon trust, from and after the death of the survivor of all her said grandchildren, the children of her said son by his present wife," for her son John Blease for life, with remainder, as to one moiety, for James Burgh, if living, or his children, if dead; and as to the other moiety, for her nephew and niece, James Chapman and Mary Bowker.

In a former clause in the will, which was commented on in argument, the testatrix gave 1,000*l.* to trustees, in trust, to invest and stand possessed thereof in trust for her grandson T. S. Blease, to be paid on his attaining twenty-three years, together with all accumulations which she directed to be made, and that no rents should be applied in maintenance during minority, unless there should be an absolute necessity; and in case of his death before he should attain twenty-three, she directed the 1,000*l.* and accumulations to become part of the residue.

The will contained no power for the maintenance or advancement of the children of John Blease. The testatrix died in August, 1805.

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John Blease, the son of the testatrix, had three children; namely, Thomas Seddon Blease, born in 1801; John Blease the younger, born on the 25th of July, 1805, after the date of the will; and the plaintiff, Alfred Whitten Blease, born in 1808, three years after the death of the testatrix.

John Blease the younger died in November, 1812, aged seven years, and the plaintiff was his legal personal representative.

Thomas Seddon Blease died in December, 1812, being of the age of eleven years; but his legal personal representative was not a party to this suit.

In December, 1831, the plaintiff Alfred W. Blease attained his age of twenty-three years.

The first question was, whether the gift of the residue to the children of John Blease the elder was vested; and, secondly, whether the plaintiff, who was born after the death of the testatrix, was to be considered one of the children entitled to take.

Mr. Spence and *Mr. Spurrier*, for the plaintiff, Alfred Whitten Blease, contended that he was entitled to the whole residue, either in his own right, or in the right of his brother John Blease, of whom he was the administrator.

That the gift to the children was vested, the enjoyment being alone postponed, and that there was nothing in the will to divest it.

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Mr. Pemberton and *Mr. G. Turner*, *contrà*, [for the defendant James Burgh].

Mr. E. R. Daniel, for the next of kin of the testatrix, contended that the gift was void for remoteness; that the plaintiff, who was unborn at the death of the testatrix, could not take; and that, at least, the accumulations subsequent to 1826, were void under the Thellusson Act, and belonged to the next of kin: *Haley v. Bannister* (1), *Eyre v. Marsden* (2).

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Mr. Spence, in reply. * * *

THE MASTER OF THE ROLLS :

March 16.

The first question in this cause was, whether the interests which the testatrix, Alice Savignac, intended to give in her residuary estate to the children of her son, John Blease, became vested at the time of her death.

At that time John Blease had two children only, namely, Thomas Seddon Blease, and John Blease the younger; and by her will, which was made before the birth of John Blease the younger, she gave the residue of her estate, &c. in the terms which have been stated.

The words in which this trust is declared, taken by themselves, import a present gift, with a direction to pay *at a future time, and an immediate vested interest in the children of John Blease, answering the description at the time of the testatrix's death; but it is truly observed that the question depends on the intention of the testatrix, which is to be collected from the whole will; and it is argued for the defendants, that upon the whole will it appears to have been the intention of the testatrix that her residuary estate should not vest in the children of her son John Blease, unless they attained the age of twenty-three years, and that consequently the gift is void as being too remote.

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There is, indeed, a delay of payment to the children of John Blease without any intermediate interest being given to any other person, and without any provision being made for the intermediate maintenance or benefit of the only persons to take; and the subject

(1) 20 R. R. 299 (4 Madd. 275).

(2) 48 R. R. 73 (2 Keen, 534).

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F.
BURGH.

of the gift is an aggregate consisting of the residue and of the accumulations of interest to be continued up to the period of distribution, and not ascertained or ascertainable till then; and besides, there are gifts over in the event of the children dying under the age of twenty-three years.

But it does not appear to me that a gift in terms which import a present vested interest, with a postponed time of payment, is made contingent by a direction to accumulate till the time of payment arrives; and I think that a gift over, which is too remote and void, as is the case here, cannot defeat the vested interests previously given; and on a consideration of these and other parts of the will, it appears to me, that the gift of the residue vested in the children of John who were entitled to take.

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There was only one such child at the time of the testatrix's death; and the next question is, whether the plaintiff, Alfred Blease, who was born between three and four years afterwards, is to be considered as one of the children entitled to take. As between the plaintiff and any person who may have claims upon, or any interest in, the estate of John Blease the younger, who died at seven years of age, that question cannot be now decided; the plaintiff cannot maintain arguments for and against himself, in different characters. The next of kin of John Blease the younger, have not been ascertained; and there is no legal personal representative of Thomas Seddon Blease, who seems to have been one of them; I incline to think, however, that there being in this case a general description of a class, and as it appears to me, vested interests given, but a postponed time of payment, and another child born before the period of distribution, that the plaintiff is let in to claim a share in his own right; and care being taken to avoid any prejudice to the defendant, the accounting party, I think, that notwithstanding some objections, he may have relief in this cause. I propose to declare, that the plaintiff and John Blease, junior, being the only children of John Blease the son of the testatrix, by Elizabeth his wife, and the plaintiff being the legal personal representative of the said John Blease the younger, deceased, the plaintiff is entitled to the residuary estate of the testatrix Alice Savignac. Refer it to the Master to take the usual accounts of her estate possessed by her executor, &c. &c. In taking such accounts, let the executor have credit for all sums properly paid by him for the maintenance and education of Thomas Seddon Blease, pursuant to the directions of the will, and have all just allowances against the plaintiff, and

against the estate of John Blease the younger; and let the clear residue of the said testatrix's estate be ascertained, and let the *Master enquire and state how much residue has been applied and disposed of, and what would have been produced thereby, if the same had been increased and accumulated, according to the directions of the will, up to the 16th of August, 1826.

BLEASE
v.
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IN RE THE ROYSTON FREE GRAMMAR SCHOOL (1).

(2 Beav. 228—232; proceedings on appeal (see note at end of case) 9 L. J. (N. S.) Ch. 250.)

The trustees of a free grammar school, whose origin did not appear, held property "to the use of the school." Having elected a schoolmaster, they obliged him to enter into a bond and agreement, stipulating that he should not have or claim a freehold in the school, or estates; and should quit at six months' notice, and should not intermeddle with the estates, and certain other stipulations as to the government and management of the school: Held, that the trustees had exceeded their powers.

1839.
Aug. 10.
Rolls Court.
Lord
LANGDALE,
M.R.
1840.
April 24.
On Appeal.
Lord
COTTENHAM,
L.C.
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THE origin of this grammar-school did not appear, but it was stated that "the yearly sum of 46*l.* 11*s.* was payable to the master of the school as wages, or in part of his salary, out of the revenues of the Duchy of Lancaster, and a house and twelve acres of land were held by the trustees under the manor of Pontefract, subject to a rent of 1*l.* 4*s.* 8*d.*, by virtue of a grant from King James the First, "to the use of the school in Royston for ever," according to the institution in the letters patent, expressed and declared, to hold of the king and his successors, rendering the rent aforesaid.

A petition was presented under the authority of Sir Samuel Romilly's Act (2), by the Rev. Wm. Wordsworth and Mr. George Treble, two of the inhabitants of the parish, praying a reference to the Master to approve of a proper scheme for the administration of this charity, and the revenues thereof, and for the conducting and management of the said school, and letting and improving the school estates, and the due application of the *revenues and income of the charity, and for many other purposes which it is unnecessary to state.

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Amongst several grounds of complaint, it was stated that in the year 1837 Mr. Thomas Howard was appointed schoolmaster, and thereupon he with a surety entered into a bond to the then trustees, in

(1) See *Legh v. Lewis*, 6 R. R. 290 (2) 52 Geo. III. c. 101.
(1 East, 391).

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the penalty of 200*l.*, for the performance of the covenants and conditions contained in certain articles of agreement of even date, and made between the trustees of the one part, and Thomas Howard of the other part; whereby, after reciting "that the said Thomas Howard had been duly elected and chosen master of the said school, upon the terms and conditions, and subject to the rules and regulations therein stated, Thomas Howard did thereby covenant with the trustees, to attend, conduct, and govern the school for the term of one year, and forward from year to year until six calendar months' notice in writing should be given by the trustees, or a majority of them, as at the end of the first or any subsequent year, to vacate the agreement. And the agreement contained various minute regulations and stipulations as to the government and management of the school; and that the master should occupy the school and school-house, and reside in the latter during his remaining master of the school, and keep the same in good tenantable repair and condition, and pay and discharge all rates and assessments in respect thereof, and should quit and deliver up the school and school-house upon six calendar months' notice, at the end or expiration of such year, in tenantable repair and condition, and thenceforth cease to be master of the school, and certain other terms as to the master's quitting; and that Thomas Howard should not, in consequence of his election of Master, have or claim any freehold in the aforesaid school and school-house, and school estate, or *any part thereof; and that nothing contained in the said agreement should extend, or be construed to extend, to any other part of the trust estate than the aforesaid school and school-house with the appurtenances; and that Thomas Howard would not, at any time, intermeddle or otherwise interfere with the other part of the estate, nor with the rents and profits thereof, but that the trustees for the time being should have the full exclusive power and entire management and control thereof; and the said trustees, in consideration of the premises, and in case the said Thomas Howard should, in every respect, fulfil and keep the aforesaid rules and regulations and stipulations, thereby agree to pay and allow to him the yearly sum of 50*l.* for the first three years, and the yearly sum of 75*l.* for each and every succeeding year, by two half yearly payments on the days therein mentioned."

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In the affidavit filed on behalf of the trustees, who were the respondents, it was stated, "that they had served Mr. Howard with a notice to discontinue the office and duties of schoolmaster, because

the trustees were dissatisfied with his conduct ; and because he had not procured a surety for the performance of his agreement ; and because he refused to reside in the school-house ; and because he refused to allow the trustees and their examiners to examine the scholars at the times mentioned in the agreement, in a room in the school-house ; and because the said Thomas Howard did not, in other respects, conform to the terms of the agreement ; and because said trustees deemed it essential to the good government of the school and estate that the master should in all respects conform thereto."

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Mr. Pemberton and *Mr. Rogers*, in support of the petition, contended, that the trustees had no right to impose *on the schoolmaster, on his appointment, the terms of his giving a bond to perform these conditions. That such an act was altogether an illegal assumption, on the part of the trustees, of a visitatorial power which was vested in the Crown, and was an attempt to exclude the jurisdiction of this Court. That the schoolmaster had a freehold, both in his office and in the estates, which the trustees could not by this mode of dealing deprive him of.

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(THE MASTER OF THE ROLLS : The estates are held " to the use of the school," and not to the use of the schoolmaster.)

That the grounds stated by the trustees were not sufficient to justify his removal ; and further, that the schoolmaster had a right to the whole revenue after keeping the school in repair, and that the trustees had no power to limit his salary.

Mr. Kindersley and *Mr. Jemmett*, *contrà*, contended that no case had been made out to justify the interference of the Court ; that the inhabitants, except the petitioners and the schoolmaster, were satisfied with the conduct of the trustees, and that they had acted rightly in securing the proper performance of his duties by the schoolmaster, by stipulations which were evidently beneficial to the charity, and necessary for that purpose.

The MASTER OF THE ROLLS said that there was a great deal of unnecessary complaint in this petition, and he must refuse the principal part of the prayer. That though it might be very proper that many of the regulations imposed by the trustees should be observed under their order and direction, yet that it was not

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proper to enforce them in the way which they had done by taking a bond from the schoolmaster. That the trustees had exceeded their powers though they had intended what was perfectly right ; that he could not dismiss the petition, but must refer it to the Master to *approve of a proper scheme for the management of the school.

A petition of appeal was presented to the Lord Chancellor by the trustees, which was dismissed on the 24th of April, 1840, [see 9 L. J. (N. S.) Ch. 250] on the ground that the Act of Parliament of the 52 Geo. III. c. 101, precludes an appeal from the Master of the Rolls to the Lord Chancellor.

1839.
Nov. 11.

EATON v. SMITH.

(2 Beav. 236—239.)

Rolls Court.

Lord
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A testator gave his residuary property to two trustees for his children, except John who had misconducted himself ; but the testator trusted his conduct would change, and he gave his trustees and the survivors of them, and the executors and administrators of such survivor, power to give to John an equal share with his brothers and sisters. He appointed the two trustees executors, and by a codicil appointed a third executor ; one alone proved the will, and the others renounced. In a state of facts brought into the Master's office, the sole executor and trustee stated that John had conducted himself to his satisfaction, and in such a manner as to entitle him to an equal share : Held, that the sole executor had power to appoint, and had well appointed a share to John.

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THE testator gave his personal estate to Robert Smith and William Baker, upon trust to sell and get in, and stand possessed thereof in trust for his children *(except John). He then proceeded to say that the name of his son John Eaton had been purposely omitted in consequence of his misconduct, and he "therefore left him the sum of 5*l.* ; but in the hope that his conduct as he advanced in years might change, and that he would behave and demean himself towards his brothers and sisters with that kind affection and tenderness which was due to them, and with respect towards his (the testator's) executors and trustees thereinbefore named, he thereby gave and granted unto his said trustees, and the survivors of them, and the executors and administrators of such survivor, full power and authority to permit his son John to have an equal share of his said estate and effects with his brothers and sisters."

By a codicil, the testator appointed William Monsdale "to be an

executor of his said will jointly with Robert Smith and William Baker therein named."

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On the testator's death Baker renounced and Monsdale declined proving, whereupon the testator's will was proved by Robert Smith alone, power being reserved to Monsdale, in the usual way, to come in and prove. A bill having been filed for the administration of the testator's estate, the business of the testator was carried on under the sanction of the Court, authority for which was given to the trustees by the will. The testator's sons John and George superintended the management of the business, and had an allowance made them by the Court for their trouble.

In a report of the Master, dated January, 1828, he certified that a state of facts had been brought in by Robert Smith, the only acting executor of the will of the testator, which stated as follows: "That the said *business so carried on under the superintendence of the said defendant John Eaton had been conducted by the said defendant to the satisfaction of him the said Robert Smith, and to great advantage; and that the said John Eaton had in all respects demeaned and conducted himself so well and properly, and in such manner to merit the confidence of the said Robert Smith, and so as to entitle him the said John Eaton to an equal share of the said testator's estate and effects, with his said brothers and sisters." Robert Smith had made to John Eaton advances on account of his share of the testator's estate, but no formal admission had been made by Robert Smith, permitting him to have an equal share with his brothers and sisters.

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In September, 1828, John Eaton died.

The cause now came on for further directions, and the question was, whether John Eaton was entitled to an equal share in the testator's estate with his brothers and sisters.

William Baker was stated to be dead and William Monsdale to be living.

Mr. Tinney and *Mr. Girdlestone*, for the plaintiffs, the other children of the testator, contended that the power given to the trustees could not be executed by Smith alone, that this was a personal discretion given by the testator to his trustees which could not be executed by the Court or the acting trustee alone.

(THE MASTER OF THE ROLLS: Can that be so? The authority is given to the trustees and the survivor of them, and the executors and administrators of the survivor.)

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 v.
 SMITH.
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Here neither the trustees nor the survivors, nor the executors nor administrators of the survivor have executed *the power: besides this, the object of the discretion is dead, and the power is therefore terminated.

Mr. Kindersley and Mr. J. Moore, for the executors, and

Mr. J. Campbell, for the representatives of *J. Eaton*, were not heard by

THE MASTER OF THE ROLLS, who said that the intention of the testator was clearly that his son John should have the opportunity of redeeming himself by his after good conduct, and which it was clear he had done to the satisfaction of *Mr. Smith*, the acting trustee; and that under the circumstances he must hold that *Smith* had approved of his conduct, and had executed the power which was vested in him, and that the representatives of *John Eaton* were therefore entitled.

STEAD v. NELSON.

1839.
 Nov. 18.

(2 Beav. 245—249; S. C. 9 L. J. (N. S.) Ch. 18; 3 Jur. 1046.)

Rolls Court.
 Lord
 LANGDALE,
 M.R.
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Freeholds were conveyed by lease and release, to trustees to the use of a *feme covert* for her separate use for life, or to the use of such person as she should by writing sealed, &c. appoint, and in default of appointment in trust to pay the rents to her for her separate use. The husband and wife by writing not under seal, for valuable consideration, undertook to execute a mortgage of the property when required. The husband died and no mortgage had been executed: Held, that the agreement was binding upon the surviving wife.

ON the marriage of *Joseph Waterworth* with *Julia Booth*, in November, 1831, a freehold estate was conveyed by lease and release to two trustees and their heirs, "To the use of the said *Julia Booth* for and during the term of her natural life to and for her own sole and separate use and benefit, or to the use of such person or persons as the said *Julia Booth*, by writing under her hand and seal, should at any time during her intended coverture direct or appoint; and in default of such direction or appointment, then in trust to pay the rents, issues and profits of the said hereditaments and premises into the proper hands of the said *Julia Booth*, or otherwise permit her to receive the same for and during her natural life, to and for her sole and separate use, wholly and independently of the said *Joseph Waterworth*, and without the same being subject to his debts or engagements; and the receipts of the said *Julia Booth* alone, notwithstanding her coverture, were thereby declared to be

good and sufficient discharges for so much of the said rents and profits as should therein be acknowledged or expressed to be received; and from and after the decease of the said Julia Booth, to the use of the said Joseph Waterworth for life," with remainder to the use of the children of the marriage, with remainder to the use of such persons as Julia Booth should by instrument sealed and delivered in the presence of two or more credible witnesses appoint, and in default thereof to the use of her brothers and sisters.

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In March, 1833, Joseph Waterworth and Julia his wife borrowed 250*l.* from a Mr. Marshall, and thereupon *Mr. and Mrs. Stead, (1) by indentures of lease and release and appointment, appointed and released the property in question to Marshall in fee, by way of mortgage, to secure the 250*l.*

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In September, 1835, Joseph Waterworth and Julia his wife borrowed 120*l.* from the plaintiff, for which they gave their joint and several promissory note, and they thereupon signed and delivered to the plaintiff a memorandum, not under seal, whereby they agreed when requested to "appoint, grant, release and convey in mortgage" the property comprised in the settlement unto the plaintiff, his heirs and assigns for ever, and that they would enter into all the usual and reasonable mortgage covenants; they also undertook to insure the life of Mrs. Waterworth for the purpose of better securing the 120*l.*

Mr. Waterworth died in 1836 leaving two children, and his assets were found insufficient to pay his debts. Marshall's debt was, however, paid by means of a policy which had been effected, and the remainder out of Mr. Waterworth's assets.

The plaintiff's debt remaining unpaid, he filed this bill against Mrs. Julia Waterworth, who had married Mr. Nelson, and against her husband, and a second incumbrancer, praying a declaration that he was in equity entitled to a valid mortgage of the property, and that, subject to the interest of the children and by virtue of the memorandum, he was entitled to an equitable lien upon the said property, and for an account and consequential relief.

There was another question, whether the plaintiff's security was entitled to priority over one subsequent *in date of a Mr. Tolson, who had taken his mortgage with notice of the plaintiff's charge, but who had got in an outstanding term.

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Mr. Pemberton and *Mr. K. Parker*, for the plaintiff, contended that the agreement was binding on the wife, for that the property

(1) *Sic*, apparently a slip of the reporter's pen.—F. P.

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being settled to her separate use she was to all intents and purposes to be considered with respect to it as a *feme sole*; in that view the agreement was binding on her, and on her separate property, over which she had not been deprived of the power of anticipation; that even if the instrument were defective in form, this Court would aid it in favour of a purchaser for valuable consideration. * * *

Mr. Kindersley and Mr. Metcalfe, contra :

* * The instrument, not being under seal, is invalid as an execution under the power.

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Again, if the interest for her separate use be of an equitable nature, that equitable estate lasted only during *the life of her husband, so that in this view of the case she had an equitable interest during the joint lives of herself and husband, with a legal remainder during her own life; and this reversionary interest could not, according to the case of *Stiffe v. Everitt* (1), be conveyed during the coverture.

The contract of a married woman is void, and so far as the agreement rested in contract it is wholly invalid against Mrs. Nelson. * * *

THE MASTER OF THE ROLLS :

This estate was vested in Mrs. Waterworth for her life for her separate use. Now, supposing a legal estate to have been vested in her, a court of law would take no notice of the words "for her separate use," but in this Court those words would give her during coverture the same right over the estate as she would have had if she had been a *feme sole*. Having that right, she enters into a contract, whereby, in consideration of a sum of 120*l.*, she agrees to execute a mortgage of this estate. That which was vested in her and over which her power extended was her life estate. It is true that her life might be prolonged beyond the life of her husband, if so, the consequence would be, that she would then have, both in equity as well as at law, an absolute power of disposition over that life estate, and I cannot say that I think that the analogy of a reversionary interest in a **chose in action* in any way applies to this case. It appears to me that she had a power to enter into this agreement, which must be specifically performed with costs, and it must be declared that the plaintiff's mortgage is entitled to priority over that of Mr. Tolson.

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(1) 43 R. R. 135 (1 My. & Cr. 37).

MILLER v. LITTLE (1).

(2 Beav. 259—260.)

1840.

Jan. 11.

Rolls Court.

Lord

LANGDALE,

M.R.

[259]

A testator bequeathed as many of his canal shares as he should leave children him surviving, one of such shares to be in trust for each of his children. At the date of his will he had eight shares and seven children, and at his death he had ten shares and eleven children: Held, that the bequest was specific.

THE testator by his will, dated in March, 1812, gave and bequeathed to his executors and trustees in these words: "As many of my shares in the Grand Junction Canal Navigation as I shall leave children me surviving, or born in due time after my death;" he then declared the trusts of this gift to be to stand possessed "of one of such shares in the said Grand Junction Canal Navigation" for each of his "children whom he should leave him surviving, or as should be born in due time after his death," and their children, in manner therein mentioned.

The testator had eight canal shares at the time of his will, and ten at the time of his death.

The testator had seven children at the time of making his will, and eleven at his death, and one of the questions was, whether the bequest of these shares was a general or a specific bequest.

Mr. Pemberton and *Mr. Evans*, for the plaintiffs, argued that the legacies were specific.

Mr. F. J. Hall, *contra*, contended that the legacies were general, and that the intention of the testator was, that the number of shares should be made equal to the number of the children left by him out of his personal estate.

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Mr. Stuart, *Mr. Wilbraham*, *Mr. Roupell* and *Mr. K. Parker*, for other parties.

THE MASTER OF THE ROLLS said he thought the bequest in question was a specific bequest of the eight shares which the testator had at the date of his will; for the testator had given as many of his shares in the Grand Junction Canal Navigation as he should leave children, and afterwards spoke of such shares, which could refer only to those described as "my shares," or those which he then had; he therefore considered this was a specific and not a general legacy, and that the eight shares only were subject to this bequest (2).

(1) *Bothamley v. Sherson* (1875)
L. R. 20 Eq. 310.

(2) See *Kirby v. Potter*, 4 R. R. 342
(4 Ves. 750).

1840.
Feb. 11, 12.

Rolls Court.

Lord
LANGDALE,
M.R.
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DAVIES v. HOPKINS.

(2 Beav. 276—281.)

A testator bequeathed a moiety of personal estate to his daughter for life, with remainder to her children, with remainder to the children of such children as should die in the life of the daughter; he gave the other moiety to his son for life, with remainder to his children; but if his son died without issue him surviving, he gave the last-mentioned moiety to the children of the daughter, "in such shares and proportions and in such manner as was therein-before directed and appointed for the payment and division of their shares in the other moiety;" the son died without issue: Held, that the daughter took a life interest in the second moiety by implication.

A bequest of 600*l.* to be applied towards payment of the debt to which Z. Chapel was or might be subject at the testator's decease. The chapel was vested in trustees for a particular class of dissenters. The general body of that class had incurred a debt for building chapels, and 600*l.* were laid on Z. Chapel, which it was expected would be raised by voluntary subscription of the members, but there was no legal liability: Held, that the legacy failed.

THE testator, Philip John, by his will dated the 25th of September, 1834, gave and bequeathed all the residue of his personal estate to trustees, in trust to invest and pay the interest of a moiety thereof to his daughter Mary Jenkins for her separate use for life; and after her decease, upon trust to pay and transfer one moiety of the whole principal monies amongst her children, share and share alike, but in case any of the children of his said daughter should happen to die in her lifetime, leaving issue at the time of his or her decease, then his will was, that the share of such child so dying should be equally divided amongst all their children; and upon trust, that his trustees should pay the dividends, interest or proceeds of the other half part or share of the said principal monies or residue of the said estate so invested as aforesaid, into the hands of the testator's son, Thomas John, for life, with remainder absolutely to the children of Thomas John; but in case any of the children of the testator's said son Thomas should happen to die in the lifetime of his said son leaving issue living at the time of his or her decease, then his will was, that the part or share, parts or shares of such child or children so dying of and in the said trust monies should

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accrue to *and be equally divided and paid to and amongst all and every his or her child or children, if more than one share and share alike, as his, her or their original share or shares respectively would become due and payable; and upon trust, that if the testator's said son should depart this life leaving no issue him surviving, then the testator willed and directed, that the said residue of all his personal estate so remaining invested as aforesaid should be paid and divided

to and amongst all and every the child or children of testator's said daughter Mary, in such shares and proportions, and in such manner as was thereinbefore directed and appointed for the payment and division of their said original share or shares in the other moiety, half part or share of his said personal estate.

By a codicil dated the 9th of May, 1838, the testator gave and bequeathed to Thomas Dalton, named and appointed by him as one of the executors of his last will and testament, the sum of 600*l.* to be by him applied in and towards payment and discharge of the debt to which the chapel called the Zion Chapel, situate in the Hayes, in the town of Cardiff, in the county of Glamorgan, at which the members of the Welsh Methodist Society congregate, was or might be subjected at the testator's decease.

The testator's son, Thomas John, died without issue him surviving.

By the decree it was ordered, that the Master should inquire and state, whether the chapel called Zion Chapel in the pleadings mentioned was at the time of the death of Philip John, the testator in the pleadings named, subject to any and what debt, and in whom the property of the said chapel was vested; and in *making such inquiries he was to be at liberty to state special circumstances.

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The Master found that the said chapel called Zion Chapel in the pleadings mentioned was not at the time of the death of the said Philip John subject to any debt; and he found that the chapel was vested in trustees for "Calvinistic Methodists." And he found that Richard Thomas by his affidavit stated, that at a committee meeting of the connection of Calvinistic Methodists, held on or about the 17th day of May, 1832, a division of debt incurred by the said connection in the erection of chapels or places of worship in the said county, was made among several of the societies or congregations belonging to the said connection, and the sum of 600*l.* was laid on the society or congregation belonging to Zion Chapel, in the town of Cardiff, as their portion of the said debt; and that the mode by which the said money was expected to be raised was by a voluntary subscription on the part of the members of the society aforesaid, and of other persons piously disposed to contribute to the same object; and the deponent further stated, that the members of the said connection, resorting for the purpose of divine worship to the said chapel, had been and then were held liable to pay to the said connection the said sum of 600*l.*, but that no security was ever given or existed for the payment of the said sum of 600*l.*; and

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the deponent further stated, that Philip John, the testator in the pleadings named, was a member of the congregation of Calvinistic Methodists resorting to Zion Chapel aforesaid, for the purpose of divine worship; and the deponent stated, that he had reason to believe that the said Philip John was well aware at the time of making his will and codicils, and of his death, that the said chapel called Zion Chapel, or the congregation resorting thereto, was or *were held liable to pay to the said connection of Calvinistic Methodists in the said county of Glamorgan, the sum of 600*l.* ; and the deponent further stated, that the sum of 600*l.* had not hitherto been paid off, but still remained due.

There were two questions, first, as to the gift to the chapel, whether there existed any such debt thereon at the time of the testator's death, as was alluded to in his will; and secondly, whether the testator's daughter Mary was entitled by implication to a life interest in the moiety of the residue given to Thomas John.

Mr. Pemberton and *Mr. Puller*, for the plaintiff, on the first point cited *Corbyn v. French* (1), *Waterhouse v. Holmes* (2).

Mr. Kindersley and *Mr. Elderton*, for the trustees of the chapel.

Mr. Coleridge contended there was a gift by implication to Mary Davies for life on the second moiety.

Mr. Jeremy, for the children, *contra*.

The cases cited on the second point were *Milsom v. Audry* (3), *Bird v. Hunsdon* (4), *Townley v. Bolton* (5), *Blackwell v. Bull* (6), *Radcliffe v. Buckley* (7), *Cripps v. Wolcott* (8).

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THE MASTER OF THE ROLLS :

The first point is as to the gift to the chapel. It appears from the affidavit set out in the Master's report, (the facts in which, with the consent of the parties, I am to treat as if they were special circumstances found by his report), that there was neither at the date of the will, nor at the date of the codicil, any thing which could clearly and regularly be called a debt charged upon this

(1) 4 R. R. 254 (4 Ves. 418, 427).

(2) 29 R. R. 75 (2 Sim. 162).

(3) 5 R. R. 102 (5 Ves. 465).

(4) 19 R. R. 82 (2 Swanst. 342).

(5) 36 R. R. 287 (1 My. & K. 148).

(6) 44 R. R. 52 (1 Keen, 176).

(7) 7 R. R. 383 (10 Ves. 195).

(8) 20 R. R. 268 (4 Madd. 11).

chapel, or due from the persons who were members of it; but about two years previous to the date of the will, by some arrangement amongst the Methodists' connection, a large debt, which had been contracted under circumstances which do not appear, had been apportioned amongst the several congregations or chapels; and under that arrangement the sum of 600*l.* had been allotted to this particular chapel, with a view not of charging it as a debt, as I understand it, but with a view of having the amount raised by voluntary contributions, and which has not been done. It does not appear, from any thing which is stated, that there was the least obligation of any sort or kind upon any of that body to pay this sum,—no legal, moral or any other obligation, or any thing that subjected the parties to any sort of liability. I confess I have great difficulty in allowing as a legacy that alleged debt, which was to be paid under these circumstances. I say it with some regret, because I cannot help suspecting that the testator really meant it; but if he meant it, he has not so described it.

With respect to the other question, which is, what is to be done with the second moiety of the residue of the testator's estate under the circumstances which have happened; it appears that as to this moiety of the residue, there is a direct gift to the children of Thomas after his *decease, and a gift over to the children of the daughter upon the death of the son without issue, but it is given so that the shares and proportions and manner are to be the same as the shares of the other moiety. Now, with respect to the other moiety, they are to have nothing till after the death of their mother; and what they are to have in expectation is subject to this, that if they die in the lifetime of Mary Davies, leaving issue, the interest which was given to them, is given to that issue.

I apprehend, that according to the direction here given, they are not to take more in the share which they were to have in consequence of the death of Thomas John, without issue than they were to take in the other share which would come to them after the death of their mother. If so, there is no gift to them of any thing until after that event.

Now, if there is no disposition at all, during the time which is to elapse between the death of Thomas John without issue and the death of Mary Jenkins, we have in this will, as to this matter, an intestacy. But the question is, whether we are not to collect from the clauses in this will sufficient to make a gift by implication. This is unquestionably a case of doubt, as all cases of this nature

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must necessarily be, but I confess I think that there is here by implication a gift to Mary Jenkins for her life. That being so, I think I ought not to go on to make any other declaration, because I do not know who may be the proper parties to contest the rights. I think I cannot now go further than to declare that Mary Jenkins is by implication entitled for her life.

1840.
Feb. 13, 14.

Rolls Court.

Lord
LANGDALE,
M.R.

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COOPER v. THE EARL OF WALDEGRAVE.

(2 Beav. 282—285.)

A bill of exchange was drawn and accepted in Paris, and made payable in England. The drawer and acceptor were living in Paris. No rate of interest was expressed to be payable on the bill: Held, that the default being made in England, interest was payable according to the English and not the French law.

As to contracts merely personal, it is a general rule, that questions relating to the validity and to the interpretation of a contract are to be governed by the law of the country where the contract was made; and if a remedy for non-performance of a contract is sought in another country, the mode of suing, and the time within which the action must be brought, are to be governed by the law of the country in which the action is brought.

THE question in this case was, at what rate interest was payable on three bills of exchange, dated in 1829, and amounting together to 800*l.*, which had been drawn by W. F. Maturin upon, and accepted by, the Earl of Waldegrave. Both the drawer and acceptor were then resident in Paris. The bills were payable in London to W. F. Maturin, or order, five months after date; but no particular rate of interest was stated to be payable on the face of the bills.

The bills by indorsement became the property of one J. P. Mottet; and in this, which was a creditor's, suit he claimed the amount of principal with interest at 6 per cent.

By the law of France, 6 per cent. is payable on mercantile instruments (1); and the question was, whether interest after this rate, or English interest after the rate of 5 per cent., was payable on these bills.

The Master was of opinion that 6 per cent. was payable.

The plaintiff took exceptions to this report.

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Mr. Stuart and Mr. Wray, in support of the exceptions.

(1) "Les intérêts pour dommages résultant du retard dans le paiement sont fixés à cinq pour cent, sans retenue dans les matières civiles, et à six pour cent dans les matières de com-

merce, par la loi du 3me Septembre, 1807." 6 Touillier, 280; and see *Corps du Droit Français*, tom. ii. p. 759.

Mr. Pemberton, Mr. Griffith Richards and Mr. L. Lowndes, contra.

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GRAVE.

[*British Linen Company v. Drummond* (1), *Thompson v. Powles* (2), *Orr v. Churchill* (3), and other cases were cited, but were not referred to in the judgment.]

THE MASTER OF THE ROLLS :

Feb. 14.

The question arises on three bills of exchange which were drawn upon and accepted by the late Earl Waldegrave in France and made payable in England ; the same bills were indorsed in France to the now holder ; the bills were dishonoured when due, and the holder has claimed the amount, with interest at 6 per cent., against the estate of the acceptor ; and the Master having allowed the claim, the question upon the exception which remains undisposed of is, whether interest is to be allowed according to the law of France or according to the law of England.

For the exceptant it is said, that although the contract was made in France, yet, as the acceptor's contract was to be performed in England by payment there, the law of England must determine the mode of payment and the consequences of nonpayment.

For the holder of the bills it is said, that the law of France, where the contract was entered into, must govern the rights of all parties claiming under the contract.

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As to contracts merely personal, I apprehend it to be a general rule, that questions relating to the validity and to the interpretation of a contract are to be governed by the law of the country where the contract was made, and that if a remedy for non-performance of a contract is sought in another country, the mode of suing and the time within which the action must be brought are to be governed by the law of the country in which the action is brought.

In the present case, the doubt does not arise upon any general rule relating to the subject, but from this,—that the contract which was made in one country was to be performed by payment of money in another, and did not itself provide for the consequences of default.

It would seem that cases of this description have frequently come under the consideration of Courts in other countries, and more particularly in America ; and that it has been held in such cases, the mode of payment and the consequences of nonpayment are to be

(1) 34 R. R. 595 (10 B. & C. 903).

(3) 2 R. R. 759 (1 H. Bl. 227)

(2) See 29 R. R. 32 (2 Sim. 211).

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governed by the law of the country in which the payment was contracted to be made. It is singular, that no case has been found in which the point has been directly determined in the English tribunals: but the cases which have been cited show that the Courts in England have decided upon principles which do not in any degree conflict with the principles upon which the Courts in other countries have proceeded.

*2-5]

The contract of the acceptor, which alone is now to be considered, is to pay in England; the nonpayment *of the money when the bill becomes due is a breach in England of the contract which was to be performed in England. Upon the breach the right to damages or interest immediately accrues; interest is given as compensation for the nonpayment in England, and for the delay of payment suffered in England; and I think that the law of England, *i.e.*, the law of the place where the default has happened must govern the allowance of interest which arises out of that default; and consequently that the exception which relates to the interest is well founded.

At the time when there is a breach of the contract of the acceptor by nonpayment in the country where payment is contracted to be made, there may be a cotemporaneous breach of contract by the drawer or indorser in the country where the contract was entered into,—where the bill was drawn and the indorsement made; and the consequences of that breach of contract may be governed by the law of the country where it takes place.

1840.
Feb. 25.

BENNETT v. FOWLER.

(2 Beav. 302—304.)

Rolls Court.
Lord
LANGDALE,
M.R.
[302]

A bill prayed the specific performance of an agreement, “if a good title could be made.” At the hearing it was declared that the agreement ought to be specifically performed, and it was referred to the Master to enquire whether a good title could be made. The Master reported in the negative. The plaintiff on further directions waived all objections to the title, and proposed to take the property; this was resisted by the vendor: Held, that the plaintiff was entitled, but being aware at the first hearing of the objections to the title, he ought to pay the costs of the investigation in the Master’s office.

FOWLER, being indebted to the plaintiff, agreed to sell him certain freehold premises for 525*l.*, and it was agreed that the debt should be retained out of the purchase-money.

The plaintiff filed his bill, praying a specific performance of the agreement, “if a good title could be made” against the personal representatives and heir-at-law of Fowler; they, by their answers, insisted that the agreement had been waived; a decree was however made whereby it was declared that the agreement ought to be specifically performed and carried into execution; and it was referred to the Master to enquire and state to the Court whether a good title could be made to the property.

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The Master reported that a good title could not be made, and the cause now came on for further directions.

Mr. Pemberton and *Mr. Wood*, for the plaintiff, proposed to waive all objections to the title and to take the property.

Mr. G. Turner (in the absence of *Mr. Tinney*) resisted a specific performance of the agreement, and contended that * * the bill must be dismissed with costs, as the plaintiff when he filed his bill was aware of the objection; that if the plaintiff should succeed, he ought to pay the costs of the investigation in the Master's office, as, if he had consented to take the title at the original hearing, the expense of the reference would have been saved.

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That the declaration in the decree that the contract ought to be specifically performed, did not prevent the Court dismissing the bill, now that it appeared that the defendants could not make a good title: *Warren v. Richardson* (1).

Mr. Wood, in reply.

THE MASTER OF THE ROLLS:

The bill prayed a specific performance of the agreement, “if a good title could be made.” Having regard to the duty of a vendor to make a good title, it appears to me immaterial whether these words were there or not. If a plaintiff prays the specific performance of an agreement, he does not intend to take the property if there is no title. The allegation of the defendants was, that the agreement has been waived, but at the hearing a decree for specific performance was pronounced, and a reference was directed to the Master to see if a good title could be made. Under that decree it was the duty of the vendor to make out a good title, and the right of the other party to have it; but I do not know *any reason why the purchaser

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v.
FOWLER.

who has that right may not, if he thinks fit, dispense with the performance by the other part of his duty, and waive carrying in objections to the title; he insisted, however, on the objections to the title, and the result was that the Master reported that a good title could not be made; this means, not that the parties have no title at all, but that they cannot make out such a title as the plaintiff is bound to accept. The plaintiff now says, I am willing to waive all the objections, and to accept the title which can be made: the question is, if he has not a right to say so. I am of opinion that the obligation to which a vendor is subject to make out a title is intended for the benefit of the purchaser only, and that if he thinks fit to waive it, he has a right to do so.

I think, therefore, the plaintiff has a right to have the agreement specifically performed, so far as it can be, and it being admitted that the plaintiff at the hearing was acquainted with the objections to the title, he must bear the costs of investigating the title: the other costs ought to be borne by the defendants.

HUE v. RICHARDS.

(2 Beav. 305—307.)

1839.
Nov. 7.
Rolls Court.
Lord
LANGDALE,
M.R.
[305]

By articles of partnership, in case of the death of a partner the survivor was to pay the amount of his capital according to the last half yearly rest, and to take the stock, &c. After the death of one, a different arrangement was entered into between his executors, (one of whom was the surviving partner) and his widow, who was beneficially interested under the will, by which the surviving partner was to take the stock at a valuation, and get in the credits, and pay the joint debts, and out of the share of the deceased partner in the surplus, to pay his separate debts and the widow's legacy. The widow by this bill sought to set aside this arrangement for fraud, and to have an account of the partnership transactions, and of the profits subsequent to her husband's death: Held, that the plaintiff was entitled to the production of the accounts of the business, as carried on after the testator's death.

MESSRS. RICHARDS and Hue carried on business in partnership together, under articles of partnership whereby it was agreed, that in case of the death of either of the partners, the survivor should not be obliged to account for the stock and profits, but should give security to pay within six months so much as upon the last half-yearly rest should appear to be due to the deceased partner, and the capital, stock, &c., were thereupon to be conveyed to the surviving partner.

Hue died in 1835, and he appointed his partner Richards and a Mr. Underwood his executors, who proved his will. By his will he

bequeathed to the plaintiff, his widow, 2,000*l.* and a life interest in the residue of his property. Upon the death of Hue the above stipulation in the partnership deed was not carried into effect, but an arrangement was entered into between the widow and the executors, by which the surviving partner (being one of the executors) was to take the partnership stock, &c., at a valuation which had been previously made; and he was to get in the credits, and pay the partnership debts; the share of Hue in the residue being ascertained, was to be applied in payment of his separate debts, and the residue was to be then applied by instalments in satisfaction of the plaintiff's legacy.

HUE
v.
RICHARDS.

This bill was filed by the widow against the executors, and sought to set aside this arrangement by various suggestions of fraud, and prayed also for an account of the partnership dealings, &c., and of the profits made by the surviving partner by means of the capital of the deceased partner.

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All fraud was denied by the answer.

A motion was now made for the production of documents admitted by the defendant Richards to be in his possession; and the question was, whether the books of account of the trade since the death of Hue were to be ordered to be produced.

Mr. Pemberton and *Mr. O. Anderdon*, for the plaintiff.

Mr. Girdlestone and *Mr. Roupell*, *contra*, contended that the plaintiff was not entitled to the documents relating to the business carried on subsequent to the testator's death. That the Court would be compelled to decide the previous question as to the validity of the arrangement, before it would hold that the plaintiff was entitled to see the private accounts of the defendant. That even if that arrangement were set aside, then the plaintiff would be remitted to her original position under the partnership articles, and the estate of the testator would be entitled only to the share of the deceased partner according to the previous half-yearly rest, and would not be entitled to participate in the subsequent profits.

THE MASTER OF THE ROLLS (without hearing a reply):

The documents, the production of which is objected to, are those which show the dealings with the joint property *after the death of one of the partners, and which the defendant calls his private accounts. I do not now intend to enter into the merits, but it appears that after the death of Mr. Hue an arrangement was made

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with the plaintiff and the executors, the whole of which the plaintiff says ought to be set aside. She says that in the valuation which was the foundation of the arrangement, she was not rightly treated, and that she is entitled to an account of the application of that, which at the death of her husband, was the joint property of her husband and the surviving partner; and she prays relief accordingly. It is said, in answer to the present motion, that if this arrangement is set aside, the plaintiff will be remitted to the partnership articles, and that then she will only be entitled to the value of the testator's capital as therein pointed out. I do not say that that will be the result of the case, or that she may not be entitled to the relief asked; she may become entitled to an account of the partnership property since her husband's death; and if so, she will be entitled to these accounts kept by the defendant. It is said that the form of the prayer of the bill is erroneous, but there is no plea or demurrer to it. The plaintiff has a right to the production with reference to the relief asked by the bill, and which may possibly be had at the hearing of the cause.

1839.
Nov. 22, 26.

Rolls Court.

Lord
LANGDALE,
M.R.
[308]

BEBB v. BECKWITH (1).

(2 Beav. 308—309.)

Bequest in trust for the children of the testator's late uncle J. B. deceased, to be divided equally amongst them, and the issue of such of them as should be deceased, share and share alike, such issue to be entitled to the share of his deceased parents, equally amongst them: Held, that a grandchild of J. B. whose parent was dead at the date of the will, was entitled to take.

THE question in this case was, whether James Beckwith, the son of a son of James Beckwith deceased who was dead at the date of the testator's will, was entitled to a share of the funds in question.

The testator directed his trustees to stand possessed of property, in trust, for all and every the children of his late uncle, James Beckwith, deceased, to be divided equally amongst them and the issue of such of them as shall be deceased, share and share alike, such issue to be entitled to the share of his, her or their deceased parents equally amongst them, subject, &c.

The father of the claimant was one of the children of the testator's uncle, James Beckwith, deceased; but he was dead at the date of the will.

Mr. Pemberton and Mr. Roupell, for trustees.

(1) See the note to *Wagh v. Wagh*, 39 R. R. 129. — O. A. S.

Mr. Stinton, for James Beckwith the claimant, cited *Tytherleigh v. Harbin* (1).

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Mr. Piggott, for the surviving children of the uncle, *contra*, contended that the issue took only the share of the parent by way of substitution, and as here the parent could take nothing, being dead at the date of the will, his child could not be substituted; he cited *Christopherson v. Naylor* (2), *Butter v. Ommaney* (3), **Waugh v. Waugh* (4), *Smith v. Smith* (5), *Collins v. Johnson* (6), *Giles v. Giles* (7).

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THE MASTER OF THE ROLLS :

The funds, it is to be observed, are to be held for all the children of James Beckwith deceased, to be divided equally, not amongst those children, but amongst them and the issue of such of them as shall be dead at the period of distribution, which was the future time contemplated by the testator, and imported by the words. I think that the words are applicable to the cases of children who might die before or after the date of his will, provided they were dead at the future period in contemplation, and I consider the direction to be, in effect, to hold the fund in trust for division amongst the children then living, and the issue of such of them as may be then dead; and the testator having used the words "share and share alike," follows them up with a direction, that the issue of a child were to take amongst them only a child's share, the effect of which, I think, is to limit the amount of the share to which the issue are entitled, but not to make the gift to issue a gift which could only take effect by way of substitution for the gift to a child living at the date of the will.

I have read the cases: *Christopherson v. Naylor* and *Butter v. Ommaney*, which are, I think, clearly distinguishable. In *Waugh v. Waugh* there was a separate provision made by the will for the child excluded on the construction upon it; and I think that the authorities do not prevent me from putting upon the words the construction which they appear properly to bear.

(1) 38 R. R. 121 (6 Sim. 329).

(2) 15 R. R. 120 (1 Mer. 320).

(3) 28 R. R. 6 (4 Russ. 7).

(4) 39 R. R. 129 (2 My. & K. 41).

(5) 42 R. R. 203 (8 Sim. 353).

(6) 41 R. R. 211 (8 Sim. 356; 4 L. J. (N. S.) Ch. 226).

(7) 42 R. R. 203 (8 Sim. 360).

1840.
Feb. 12, 13, 14.

ATTORNEY-GENERAL v. THE IRONMONGERS' COMPANY.

Rolls Court.
Lord
LANGDALE,
M.R.

[313]

(2 Beav. 313—332; S. C. 4 Jur. 145; on appeal, 1 Cr. & Ph. 208; 10 L. J. Ch. 201; in H. L. 10 Cl. & F. 908.)

In an information by the *Attorney-General* at the instance of a relator, the *Attorney-General* ought not to appear otherwise than in support of the information.

As to the position of the *Attorney-General* in informations at the instance of a relator, and the practice in such cases.

[SEE the report of this case on appeal in 1 Cr. & Ph. p. 208, where the LORD CHANCELLOR reversed the decision of the MASTER OF THE ROLLS as to the *cy pres* application of certain funds bequeathed by the will of Thomas Betton in 1723 for charitable purposes which had become obsolete. But that reversal does not impair the force of certain observations made by the MASTER OF THE ROLLS upon the point mentioned in the head-note which are occasionally referred to and may be conveniently retained in the report of the case at the Rolls Court.

In order to explain these observations it should be stated that a similar trust for the same obsolete purposes had been created by the will of Lady Mico in the year 1670, and that the trust funds under that will were administered by trustees under a scheme approved and established by the Court, and that the trustees of that charity known as the Mico charity had presented a petition praying that the available funds under Thomas Betton's will might be transferred to them to be applied by them under a scheme similar to that under which the Mico charity was administered.]

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The *Attorney-General* attended as counsel for the Mico charity, and

Mr. Pemberton, on opening the case, stated he appeared as counsel for the relator.

The MASTER OF THE ROLLS said that he did not recognise the relator as distinct from the *Attorney-General*; that the suit was the suit of the *Attorney-General*, though at the relation of another person upon whom he relied and who was answerable for costs; and that he could only recognise the counsel for the relator as the counsel for the *Attorney-General*, and could hear them only by his permission; that the suit was so entirely under the *control of the *Attorney-General* that he might desire the Court to dismiss the

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information, and that if he stated that he did not sanction any proceeding, it would be instantly stopped.

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Mr. Pemberton then proceeded for the informant, and

The *Attorney-General* personally attended as counsel for the trustees of Lady Mico's charity.

On the following day, on coming into Court,

THE MASTER OF THE ROLLS said :

I wish to make a remark upon the position in which *Mr. Attorney-General* stands in this case, and I regret that I omitted to do so yesterday. I then, however, very clearly stated my opinion, that a proceeding upon an information of this kind was a proceeding of the *Attorney-General*; and that he had the entire control and management of it throughout. I believe I ought to have gone on to say that the *Attorney-General* ought not to be allowed to appear for any other party than the informant. I had some recollection that the point had occurred before; but I could not distinctly recollect where it was to be found; I have, however, since found it referred to in a note to *The Attorney-General v. The Mayor &c. of Galway* (1), where a petition of rehearing was entitled as the petition of the relators in the suit, upon which Sir A. Hart remarked that it was not a proper form, and said "that it should be the petition of the *Attorney-General*, for the relator is not looked upon as a party. If he dies the suit does not abate, and his intervention is only in respect of costs. The *Attorney-General* *is the party, and the petition of appeal should be the petition of the *Attorney-General*, at the relation of the relators." Sir A. Hart there states, "that Lord ELDON had often said, that in an information at the suit of the *Attorney-General* that officer ought to be of counsel with the relators." That "the point arose when Lord Gifford was *Attorney-General*, in *The Attorney-General v. The Mayor of Bristol*. He was Recorder of Bristol, yet Lord ELDON laid it down that he should be counsel for the information and not for the defendants."

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In former times, briefs in these cases were delivered to the *Attorney-General*, and he was in the habit of personally appearing upon them. Many cases have recently occurred in which there has been great reason to regret the want of his appearance. He did not always appear when briefs were delivered; the expense of

(1) 1 Molloy, 97.

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delivering them was thought a grievance, the practice has been altered, and the relators have too often considered themselves entitled to conduct the suit in their own manner.

But still the suit is the suit of the *Attorney-General*, and if he should desire the information to be dismissed, the Court must dismiss it accordingly, and it is for him, in the exercise of his public duty, to determine whether he will proceed at all, and if so, in what manner. He is, therefore, placed in a singularly inconvenient, if not in an incompatible position, when he appears on behalf of a defendant to oppose the information. In my opinion this inconvenience ought to be avoided, and the mind of the *Attorney-General* ought to be free from every thing which can tend or appear to tend to bias the judgment with which, in the discharge of his public duty, he is to direct the conduct of these informations. And this opinion is the result of a very great number *of years' experience, in which I have seen the great mischief which has arisen in consequence of the *Attorney-General* not being present. The sort of projects which have been proposed in his name, under the sanction of his high official authority, would surpass belief. Schemes which have been proposed in charity cases have been sometimes of the most extravagant nature; the discussion has led to enormous expense, which the charities have been loaded with. In order to prevent, in some degree, that abuse, which arose from the deviation from the old practice, which, even in my remembrance, was that the *Attorney-General* should always attend before the Master by counsel upon the consideration of a scheme, Sir JOHN LEACH directed that counsel for the *Attorney-General* should always attend, not as a distinct party, but to prevent the persons who were there retained by the relators having the sole control of the promotion of a scheme, that is, the counsel for the *Attorney-General* was to attend there to control the counsel who were retained by the relators, and in order that that important public officer might be present at the proceedings and protect not only the charity but the public.

If I could do what I think right, I would take care that the *Attorney-General* personally, or some gentleman retained under his direction, should be present upon every charity proceeding, because without that vigilance and sanction which he in that way could bestow, there is no protection for charities or the public.

In this particular case, as the matter has proceeded so far, and as any change would be productive of considerable expense, it appears

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to me better to go on with the present arrangement: upon any future occasion I hope that a different arrangement will be made.

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The *Attorney-General* observed, that it had been the practice for the *Attorney-General* to appear by his counsel separately from the counsel of the relators. That he had personally appeared in the House of Lords in the case of *Lady Hewley's Charity* in opposition to the information, when the House intimated a clear opinion that it was regular. That he was anxious to have it understood that the *Attorney-General* did not give his sanction to the scheme of the relators, though it was his wish that the Court should hear every thing and then decide.

The MASTER OF THE ROLLS remarked that he did not know any thing more important to the general interests of charities and of the public, so far as it was interested in charities, than that the authority and discretion of the *Attorney-General* in all these proceedings should be maintained perfectly unbroken, unfettered, and unbiassed.

TOWNSEND v. WESTACOTT (1).

(2 Beav. 340—345; S. C. 9 L. J. (N. S.) Ch. 241; 4 Jur. 187.)

A party largely indebted makes a voluntary settlement, and becomes insolvent within three years: Held, sufficient to avoid the settlement under the 13 Eliz. c. 5; and held also, that in order to set it aside it was not necessary to prove that the settlor, at the date of the settlement, was in a state amounting to insolvency.

A bill alleged that the settlor, at the time of making a voluntary settlement, was greatly indebted, it did not state the particulars of the debts, but referred to a schedule of the settlor in the Insolvent Court in aid of the suit: Held, that the existence of the debts was not sufficiently put in issue as against an infant, but an enquiry was directed on the point.

In the year 1830 the defendant, John Westacott, was absolutely entitled, amongst other property, to five closes of freehold land, which stood limited to the usual uses to bar dower, and as to which there were outstanding terms vested in trustees to attend the inheritance.

On the 2nd of April, 1830, Westacott appointed and released this property to a trustee, upon trust for himself for life, with remainder to Maria Pook, an infant, the daughter of his housekeeper Elizabeth Pook, absolutely, with a gift over to Elizabeth Pook in case of the

1840.
Feb. 20, 25.
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(1) *Taylor v. Coonan* (1876) 1 Ch. D. 636, 34 L. T. 18; *Ridler v. Ridler* (1882) 22 Ch. Div. 74, 52 L. J. Ch. 343, 48 L. T. 396.

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death of Maria Pook before she attained twenty-one. This deed was purely voluntary, and was made without any consideration. No marriage was then in contemplation; but some time afterwards Westacott married Elizabeth Pook.

In October, 1832, Westacott was imprisoned for debt; and on the 19th of January, 1833, he petitioned for relief under the Insolvent Debtors' Act, and executed the usual conveyance to the provisional assignee. In March, 1833, his petition was heard, when he was remanded for nine months, at the end of which time he was discharged. The plaintiff, his assignee, to whom the usual conveyance had been made by the official assignee, filed this bill, stating, that in April, 1830, Westacott was in insolvent circumstances, and indebted in upwards of 6,500*l.*, which he was unable to pay; that he had executed the deed with the intent to delay and defraud his *creditors; that he had continued insolvent and indebted down to the time of his imprisonment; and it contained the following allegation: "That the schedule of the debts of the said John Westacott, annexed to his said petition, and verified by his oath, contained debts due from him to the amount of 8,184*l.*, of which sum debts to the amount of more than 5,600*l.* appeared, by the said schedule, to have been, and in fact were due from the said John Westacott on the 2nd of April, 1830, and plaintiff craves leave to refer to such schedule in aid of this suit, and intends to prove, if necessary, such existence as aforesaid of the said debts;" the bill did not, however, specify any debts. It prayed that the deeds might be declared fraudulent and void, and might be delivered up to be cancelled; and for a conveyance to plaintiff as assignee, by the trustee of the deed; for an assignment of the outstanding terms; and if necessary, that the validity of the instruments might be tried by an action at law, and for that purpose that the outstanding terms might be removed.

The defendants, Westacott and wife, insisted that he was not insolvent at the time of the execution of the deed; but that his property at that time would have produced 7,000*l.*, while his debts and liabilities did not exceed 5,600*l.*; the infant, Maria Pook, put in the common infant's answer.

The plaintiff proved the existence of debts on the 2nd of April, 1830, of about 2,256*l.* due to creditors mentioned in the insolvent's schedule, including therein a debt due to the plaintiff on bond dated in 1829.

The defendant entered into evidence to prove the value of the property, but the evidence was considered very unsatisfactory by the Court.

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Mr. Pemberton and *Mr. Chandless*, for the plaintiff, contended, that the settlement was fraudulent and void under *the statute of 13 Eliz. c. 5, against creditors existing at the time, and that being set aside with regard to them, all subsequent creditors would be let in. * * *

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Mr. Richards and *Mr. Elderton*, *contra*, objected that there was no allegation in the bill that the plaintiff was a creditor at the time of the execution of the settlement, or that he was a creditor at all. That the existence of the debts at the time had not been properly put in issue by the bill; and that the reference to the schedule, which was binding alone on the husband, was not sufficient for that purpose; that consequently the evidence of these debts could not be received as against the infant and the married woman. * * *

Mr. Jemmett, for trustees.

Mr. Chandless, in reply, contended that the debts were properly put in issue by the reference to the schedule, and stated they had been so alleged to save the great *expense of setting out the debts in the bill; he argued that if there existed any doubt, then that the case ought to be put in a course of enquiry.

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[A number of earlier cases were cited, but none of them were referred to in the judgment, and the numerous subsequent cases upon the statute make it no longer necessary to refer to the earlier authorities.]

THE MASTER OF THE ROLLS:

This bill is filed by the assignee of Westacott, an insolvent debtor, against the insolvent, his wife and her infant daughter, and against the trustees of the settlement and of some outstanding terms of years. The object of the bill is to set aside for fraud a voluntary conveyance, which was made by the insolvent on the 2nd of April, 1830, to a trustee, for himself, for life, and afterwards in trust for Mrs. Pook and Maria Pook, her infant daughter. Mrs. Pook, being a stranger to the settlor, and no marriage being in contemplation at the time, though they afterwards married, this deed was a purely voluntary conveyance; and if it was a conveyance executed for fraudulent purposes it ought to be set aside; but if the transaction was honest, and without fraud, it ought not to be interfered with. In the first place, it is alleged on the part of the

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plaintiff, that this deed was executed entirely without consideration ; that is admitted. In the next place it is said, that the settlor was largely indebted at the time ; and of this there is strong evidence, which I shall presently notice. Being largely indebted he made this voluntary conveyance, and in less than three years afterwards he became absolutely insolvent. On these facts alone, provided they were properly put in issue and proved, I am of opinion that this conveyance ought to be set aside as fraudulent.

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The state of the pleadings, however, is this, it is alleged by the bill that Westacott was, at the time, in insolvent circumstances, and indebted in a large amount to several persons, which he was unable to pay. The persons to whom he was so indebted are not specified ; *but it is stated, in a subsequent part of the bill, that having become insolvent, his debts in his schedule appeared to be 8,184*l.*, of which 5,600*l.* were due on the 2nd of April, 1830 ; and the plaintiff then “craves leave to refer to such schedule in aid of the suit, and intends to prove, if necessary, such existence as afore-said of the said debts.” With respect to Westacott himself, the schedule is a sufficient admission of the debts ; but of the other defendants one is a married woman, and the other an infant, who has put in a common infant’s answer. These defendants have not had an opportunity of examining these debts. It would be very difficult to hold the infant or the married woman absolutely bound by the allegations as to the schedule, even for the purpose of putting them to prove that they are not to be affected by them ; for everything as regards an infant or a married woman must be taken strictly. I can have no doubt that the bill was put in this form with the very proper intention of saving expense ; but this upright intention is sometimes defeated without the least fault of those who defend the case ; and the advisers of the infant and married woman are quite right in seeing that these debts are strictly proved against them.

There has been a little exaggeration in the arguments on both sides as to the principle on which the Court acts in such cases as these : on one side it has been assumed that the existence of any debts at the time of the execution of the deed would be such evidence of a fraudulent intention as to induce the Court to set aside a voluntary conveyance, and oblige the Court to do so under the statute of Elizabeth. I cannot think the real and just construction of the statute warrants that proposition, because there is scarcely any man who can avoid being indebted to some amount :

he may intend to pay every debt as soon as it is contracted, and constantly *use his best endeavours, and have ample means to do so, and yet may be frequently, if not always, indebted in some small sum: there may be a withholding of claims, contrary to his intention, by which he is kept indebted in spite of himself; it would be idle to allege this as the least foundation for assuming fraud or any bad intention. On the other hand, it is said that something amounting to insolvency must be proved to set aside a voluntary conveyance: this too, is inconsistent with the principle of the Act, and with the judgments of the most eminent Judges. The evidence as to the value of Westacott's property when he executed the settlement I cannot rely on; it is brought forward many years after the witnesses had known it, and they speak to the value of the property without taking into consideration any charges that might be upon it; and I am not in a situation of knowing whether there were any charges upon it.

Under the circumstances in which this case has been brought before me, if the married woman and infant had had the opportunity of meeting the evidence as to the existence of the debts at the time of the settlement, I should have been bound to make the decree which is asked for in the first instance. I cannot, however, under the circumstances, make such a decree as is asked; but the plaintiff is, I think, entitled, under the alternative prayer of his bill, to try the validity of the settlement by an action at law; but if there are any difficulties which cannot be removed, I will direct a reference to the Master.

The case was subsequently mentioned, when it was referred to the Master to inquire what debts were owing by Westacott at the date of the deed, and at the time of his insolvency.

GAUNT v. TAYLOR.

(2 Beav. 346—347; S. C. 4 Jur. 166.)

Where several persons are made defendants in respect of a joint fiduciary character only, or if any beneficial interest which they may have does not conflict with their duty, they ought not to sever in their defences, otherwise one set of costs only will be allowed them.

THE testator by his will had given his widow an income of 370*l.* out of his estate, and had appointed her, together with Shaw and Tottie, his executrix and executors and who proved his will. This

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v.
WESTACOTT.
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1840.
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was a creditor's bill filed against the executors, executrix, and the heir-at-law of the testator for the usual administration of his estate. The executrix and executors appeared jointly to the bill, but the widow, having an interest in the estate different from that of her co-executors, severed in her defence, and throughout the subsequent proceedings appeared by a different solicitor. By orders made on former occasions, two sets of costs had been allowed them, and the cause now coming on for further directions, it appeared that the personal estate was insolvent, and that the testator was not a trader.

Mr. Kindersley, Mr. G. Richards and Mr. James Russell, for the plaintiff, contended that the executors and executrix were to be allowed one set of costs only, as there was nothing to justify their separating in their defences.

Mr. Treslove and Mr. Parker, for the two executors, and

Mr. Pemberton and Mr. Elderton, for the widow, contended that two sets of costs ought to be allowed, as the widow had a beneficial interest distinct from and inconsistent with that of the co-executors; and that the former orders furnished a principle which the Court ought to adopt on the present occasion.

[347] THE MASTER OF THE ROLLS :

Where several persons are made defendants in respect of a joint fiduciary character only, or if the beneficial interest which any of them may have in the matters of the suit is in no way conflicting with their other duty, they certainly ought to answer and defend together; if they do not, and there are no special circumstances, then, according to the settled rule of the Court, they will be allowed one set of costs only. On the other hand, if one has a personal interest which conflicts with his duty as trustee, or if one of several trustees can admit facts which the others believe not to be true, it then becomes impossible for them with prudence to answer together. Whether they are entitled to two sets of costs depends on the circumstances of each particular case. If a party creates unnecessary expense it is just that he should be deprived of his costs; and if several trustees unnecessarily sever their defences, it is right that one set of costs only should be allowed: the question always is, whether there was reasonable ground for them to sever.

The previous orders made in this case allowing two sets of costs have, I think, considerable bearing on the present question; and under all the circumstances I think two sets of costs must in this case be allowed.

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TAYLOR.

TINKLER v. HINDMARSH.

(2 Beav. 348—352.)

1840.
Feb. 23.

Rolls Court.
Lord
LANGDALE,
M.R.
[348]

In an administration suit, the Court authorised the legal personal representative to carry on newspapers which formed part of the assets, and a stationer for that purpose furnished paper on credit: Held, that he was entitled to be paid out of the fund in Court forming part of the testator's estate, though such estate was insufficient to pay the testator's debts.

THE intestate in this cause was the proprietor of the *True Sun* and *Weekly True Sun* newspapers, and immediately on his death, in June, 1834, a creditor's suit was instituted for the purpose of having his estate administered.

By an order of this Court, dated the 8th of November, 1834, it was referred to the Master to inquire and state whether it would be for the benefit of the estate that the newspapers should be sold, or whether it would be more for the benefit of the estate that they should be carried on and continued to be published for the benefit of the estate; and whether any other measures ought to be taken to prevent the publication of the newspapers, or any of them, from being suspended, and until he should have made his report, and until further order, Elizabeth Hindmarsh and Jane Tegg, the legal personal representatives, were to be at liberty to carry on and continue the same on the account and at the expense of the intestate's estate, and to retain and apply for that purpose such parts of the monies belonging to the estate, or to arise from the publication and sale of the newspapers in the mean time, which should come to their hands, as should be necessary. The Master reported that it would not be for the benefit of the estate that the newspapers should be sold.

By another order dated the 22nd of April, 1835, it was referred to the Master to inquire and state whether it would be proper that the newspapers should be carried *on, and it was ordered that the administratrixes should be at liberty to carry on the newspapers at the expense of the estate in the mean time.

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The Master, by his report dated the 7th of May, 1835, recommended that the newspapers should be sold for 2,600*l.*, which was done in June, 1835.

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 v.
 HINDMARSH. Messrs. Pewtress & Co. having been informed by the legal personal representatives that the newspapers were to be carried on under the orders of this Court, continued after the testator's death to supply the paper necessary for the publication of the newspapers, down to the time of their sale, and in respect thereof 723*l.* became due to them.

Messrs. Pewtress now presented a petition to obtain payment of the 723*l.* out of a sum of 2,407*l.* Consols standing in the Court to the credit of the cause, which, as was stated, had partially arisen from the newspapers, and to have it declared that they had a lien on such fund for the amount of their debt.

The estate was insufficient for the payment of all the intestate's debts.

Mr. C. P. Cooper and *Mr. Parker*, in support of the petition, contended that the amount ought to be paid out of the estate, or at least out of the part which had accrued from carrying on the newspapers, and which had in fact been produced by the capital of the petitioners; that the petitioners had trusted the Court, and ought not to be put to their personal remedy against the administratrixes.

[*350] *Mr. Roupell*, *contrà*, on behalf of the creditors of the intestate, opposed the prayer of the petition, and contended *that the petitioners had a lien on the actual produce of the papers only; and that the fund in Court, which, he stated, had not been derived therefrom, was not liable to the petitioners.

Mr. Pemberton and *Mr. K. Parker*, for the administratrixes.

THE MASTER OF THE ROLLS:

This is a petition presented by gentlemen who are stationers, praying that they may be declared to be creditors upon the estate of the intestate, and to have a lien upon a particular fund for the amount of their claims.

The intestate in this case was the proprietor of certain newspapers, and in June, 1834, immediately or very soon after his death, this suit was instituted for the purpose of having the directions of the Court taken, and for having the estate administered for the payment of his creditors. It appears, by the evidence before me, that very shortly after the death of the intestate, it was represented by the legal personal representatives that they intended

to obtain the sanction of this Court for carrying on the newspapers which had been conducted by the intestate; and that in the expectation that such an authority would be given the petitioners supplied paper. The Court was in fact applied to in the following month of November, and an order was made,—not an order, as has been argued, by which this Court took upon itself to carry on the trade, for a most absurd thing would it be for this Court to make an order whereby it undertook to carry on a newspaper; but it was an order that it might be carried on at the expense of the estate. The legal personal representatives were to be at liberty to carry it on at the expense of the estate, *and they did carry it on. The representations, therefore, which had been made to the petitioners turned out to be correct. It must be assumed that it was for the benefit of the estate that it should be carried on, and if so, it would seem that the expenses ought to be defrayed by all those who had any interest in the estate. The supply of paper commenced in July, 1834, and continued down to June, 1835; and in the month of May, 1835, a report was obtained that it would be proper to sell the copyright, and a sale actually took place on the 23rd of June, 1835. During that time the supply of paper necessary for carrying on the trade, which the legal personal representatives were at liberty to carry on at the expense of the estate, was supplied by the petitioners. Some of the expenses were paid in ready money and some not. If the legal personal representatives had from time to time paid ready money for the supply of the paper, which they were justified in doing, it would have been repaid them out of the estate before any other persons having claims upon the estate could have received any thing.

Then comes the question, How is this balance to be paid? I must say, it does not seem to me material whether this fund of 2,600*l.* was the produce of the newspaper or not; I certainly am not satisfied that it was. If it really were material to these parties to know what was the fund which was realised by the newspaper it ought to be inquired into, but I do not think that it is material. This is an expense which, with the leave of the Court, was incurred for the benefit of the estate and of the creditors. It may unfortunately have turned out a losing concern, still it was done for the benefit of the estate; and though the experiment might fail, the expense, it would seem, must fall on the estate before the persons beneficially interested in it can receive any thing out of it.

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This claim is made as upon the balance of an account; it is necessary, therefore, that an account should be taken of the value of the paper supplied, and of the sum already paid to the petitioners, which must go in reduction of their demand.

1840.
March 3.
—
Rolls Court.
Lord
LANGDALE,
M.R.
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RING v. HARDWICK (1).

(2 Beav. 352—359; S. C. 4 Jur. 242.)

A bequest to testator's wife for life, and after her death to make a division between the testator's four children, A., B., C., and D.; his sons' shares to be paid immediately, and his daughters' shares to be invested for them for life, with remainder between all their children, to become vested at the age of twenty-five, with a gift over to the children of the others who should live to attain the age of twenty-five, in case either daughter should die without leaving any child who should live to attain twenty-five; with powers for the maintenance and advancement of such children: Held, that the gift over was too remote; and secondly, that the gift to the daughters in the first instance being absolute, and the attempt to limit it having failed, the absolute interest remained unaffected, so that the representatives of a daughter who died without children were entitled to her one-fourth share.

THE question in this case arose upon the will of William Davies, dated in 1825, whereby he gave his residuary personal estate to P. Hardwick, Wm. Clare, and his wife, Mary Davies, upon trust to convert and to invest in their names upon Government security, and to pay the dividends and the rent of the leaseholds, &c. to his wife, Mary Davies, "during the term of her natural life or widowhood;" and he proceeded as follows: "And from and immediately after the death or second marriage of my wife the said Martha Davies, then upon trust that they the said Philip Hardwick, William Clare and Mary Davies, or the survivors, &c., do and shall with all convenient speed collect in the outstanding parts of my said personal estate, and add the same to my money in the funds, and make a division of all the said money then in the funds, &c., and all and every other parts or part of my said personal estate between all and every of my four children, viz. my two sons, the said William Davies and James Davies, and my two daughters, the said Mary Davies and Martha Ann West." *He then provided that the "division" was not to be made into four equal parts, but that a sum of 2,000*l.* should be appropriated and paid out of the shares of his sons, James and William Davies, "to or for the use and to augment the shares of his two daughters, the said Mary Davies

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(1) Cited by Lord ALVERSTONE, C. J., *In re Hancock* [1901] 1 Ch. 482, 497, 70 L. J. Ch. 114, 118.

and Martha Ann West, in equal shares and proportions, to be received by or for the use of them the said Mary Davies and Martha Ann West. And subject thereto the division of all and singular his said personal property at the decease or second marriage of his said wife, the said Martha Davies, was to be equal, share and share alike, between his said four children, viz. his said two sons, the said William Davies and James Davies, and his said two daughters, the said Mary Davies and Martha Ann West, the shares of his said two sons, the said William Davies and James Davies, were to be paid and transferred to them immediately upon the decease or second marriage of his said wife, the said Martha Davies, upon their first appropriating thereout, or otherwise paying the said sum of 2,000*l.* to or for the use of, and to augment the shares of his said two daughters, the said Mary Davies and the said Martha Ann West; to hold the said shares unto them the said William Davies and James Davies severally and respectively, and their several and respective executors, administrators and assigns, from thenceforth absolutely for ever."

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The will then contained a gift over between the surviving brother and sisters of the sons' shares, in case either died unmarried and without issue before their shares should become payable, and proceeded as follows: "But as touching and concerning the shares of my said personal estate, which with the said augmentations will become the property of my said daughters, the said Mary Davies and Martha Ann West, upon the *decease or second marriage of my said wife, the said Martha Davies, my directions are, and I do hereby declare my will and meaning to be, that the whole of such shares and augmentations shall immediately upon the decease or second marriage of my said wife, the said Martha Davies, be invested and laid out upon Government security at the Bank of England, under the superintendence of them, the said Philip Hardwick and William Clare, or the survivor of them, in manner following, that is to say, the share and augmentation of the said Mary Davies as hereinbefore mentioned, and also any other augmentation which may become her share by the decease of the said William Davies and James Davies or either of them unmarried and without issue, as is also hereinbefore mentioned, or by the decease of the said Martha Ann West, as hereinafter mentioned, shall be so invested and laid out in the names of the said Philip Hardwick, William Clare and William Davies, or the survivors, &c. jointly with and in the name of her the said Mary Davies,

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upon trust that they the said Philip Hardwick, William Clare and William Davies, &c. do and shall permit my said daughter, the said Mary Davies, to receive the dividends for life for her separate use; " "and from and after her decease then upon further trust that they, the said Philip Hardwick, William Clare and William Davies, &c. do and shall pay, divide and transfer the capital money which formed the share and augmentation of my said daughter, the said Mary Davies, unto, amongst and between all the children, whether male or female, and both male and female of my said daughter, the said Mary Davies, in equal shares and proportions, and to become vested in such children respectively at the age of twenty-five years; and if any such children or child shall die under that age, the share or shares of all and every such children or child shall be divided amongst the survivors of such children who shall live to *attain that age; and if only one child shall live to attain that age, then the whole of such share and augmentation shall belong to such only child upon his or her attaining that age; and if it shall happen that the said Mary Davies shall depart this life without leaving any such children or child who shall live to attain the said age of twenty-five years, then the whole of the said shares and augmentations shall be upon trust, and shall be divided between all the children of the said William Davies, James Davies and Martha Ann West, whether male or female, and both male and female, who shall live to attain the said age of twenty-five years, in equal shares and proportions; and if only one such child shall live to attain that age, then the whole of such share and augmentations shall belong to such only child upon his or her attaining that age."

The testator declared similar trusts, *mutatis mutandis*, of Martha Ann West's share, and contained the following powers of maintenance and advancement: " Provided always, that in case of the death of the said Mary Davies or the said Martha Ann West before their children, or the children or child of either of them, shall have attained the said age of twenty-five years, or in case they the said Mary Davies and Martha Ann West, or either of them, shall depart this life without leaving any children or a child, and there shall be then living any children or a child of the said William Davies and James Davies, or either of them, but such children or child may not then have attained the said age of twenty-five years, it shall be lawful for the said Philip Hardwick, William Clare, and William Davies, &c. to receive the dividends of the share and augmentations

of the said Mary Davies and Martha Ann West, or either of them, as the case may be, and apply the same dividends, or a competent part thereof, for the education and maintenance of the children or child of the *said Mary Davies and Martha Ann West, or of the said William Davies and James Davies, as the case may be, until such children or child shall attain the said age of twenty-five years, according to the true intent and meaning of this my said will as hereinbefore mentioned and expressed in respect thereof; and upon the same principle, in the event or events last aforesaid, it shall and may be lawful for the said Philip Hardwick, William Clare and William Davies, &c. with the consent of the said Mary Davies and Martha Ann West during their respective lifetimes, and after their deaths or the death of either of them, then in the discretion of the said Philip Hardwick, William Clare and William Davies, &c., by sale of any part of the said Government securities, to raise and advance any part of the share of any one or more of the said children for their advancement in the world, not exceeding one quarter part of the probable expectant share of every one such."

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v.
HARDWICK.

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The testator died in 1827; his widow survived him but a short time; his daughter, Mary Davies, married the plaintiff, Mr. Ring, and died in 1829, without having had any child born alive, and the plaintiff was her administrator. The testator's sons, William Davies and James Davies, were also dead, and had left children. Martha Ann West was living, and had children, two of whom were born in the testator's life.

The questions which arose upon the death of Mary Ring without children, as to the share intended for her and her children, were first, whether the gift over to the children of her brothers and sisters was too remote; and if so, then whether under the circumstances she took a life or an absolute interest in that share.

Mr. Pemberton, Mr. Purvis and Mr. Humphry for the plaintiff. * * *

Mr. Bethell for Mrs. West; and

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Mr. Kindersley for the representatives of William Davies, contended that * * the gifts over were void, and that consequently there was an intestacy as to this share to which the next of kin were entitled.

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v.
HARDWICK.
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*Mr. Tinney and Mr. Keene, for the children of Mrs. West. * * **

Mr. Pemberton having commenced his reply,

THE MASTER OF THE ROLLS said :

Upon the last point I will not trouble you. The children, on whose behalf this case has been argued, if they take any thing must take it under that clause directing a division between all the children "who should live to attain the age of twenty-five years." It is admitted, that a gift expressed by those words is by itself too remote and void ; but then it is said, there are other directions in the will which ought to qualify that construction. The directions are first of all, upon the death or second marriage of the wife to invest, &c. the particular share previously given to a daughter, in the name of the trustees. Then it is said, that in the subsequent clause, which refers to a period when the children are under twenty-five, that which was intended for the children is termed "the share" of the children, and that, therefore, the gift is vested, subject to be divested ; but I consider this share means such share as had been before given, that is, a share for such as should live to attain twenty-five years, and this subsequent clause cannot therefore alter the effect of the previous gift. Next it is said to be a gift with a double aspect. I am of opinion that that is not the true construction *of the clause. In respect to the clauses for maintenance and for raising money for advancement, they are accessories to that which is void, and cannot therefore alter the construction. Upon the other point as to the extent of the gift to the daughter, I will hear a reply.

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Mr. Pemberton having replied,

THE MASTER OF THE ROLLS said :

I think that there is sufficient to be collected from the prior words in this will to give an absolute interest to the daughters ; and those prior words are so connected with what follows as to show that the testator intended a restriction of that absolute interest ; and the restriction not having become effectual, the whole interest remained according to the original gift.

SMITH *v.* LANGFORD.

(2 Beav. 362—363.)

1840.
 March 12.
 —
Rolls Court.
 Lord
 LANGDALE,
 M.R.
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A testator, a victualler, directed his trade to be carried on by his executors, a brewer and spirit merchant who had been in the habit of serving him in his lifetime, and supplies were furnished for that purpose by them. The Court would not declare that the executors were entitled to receive the cost price only for these supplies; but directed an inquiry whether the supplies were proper, and furnished at the ordinary market price.

THE testator, a victualler, authorised his executors and trustees to carry on his trade for the benefit of his family with full powers for that purpose. One of them was a brewer, and the other a spirit merchant, and had been accustomed to serve the testator in his lifetime. After the death of the testator they carried on the business, and furnished the supplies of beer and spirits.

The bill was filed by a party entitled to a share in the residue, to have the trusts of the will carried into execution.

The executors by their answers stated that they had charged a fair and current market price for the stores furnished after the testator's death.

Mr. Lovat, for the plaintiffs, now contended, that in the decree for taking the accounts, there ought to be a special direction that the executors should be allowed the cost price only for the supplies furnished by them: *Moore v. Froud* (1).

Mr. Spence and *Mr. Renshaw*, in the same interest.

Mr. Rogers, *contra*, contended that the plaintiff was entitled to the common decree only, and that the principle of *Moore v. Froud* applied to professional persons alone; he did not, however, object to any inquiry as to the fairness of the charges.

The MASTER OF THE ROLLS said he could not make any such order as that asked; that all he could do would be to direct the Master in taking the accounts to see that the supplies were proper and furnished at the ordinary market price. That he could not suppose that the testator, who had himself directed his business to be conducted by these defendants, expected they would be deprived of the usual fair profit.

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(1) 45 R. R. 205, 3 My. & Cr. 45.

WAINWRIGHT *v.* HARDISTY.

(2 Beav. 363—366.)

1840.
 March 13.

Rolls Court.
 Lord
 LANGDALE,
 M.R.
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By a deed, which represented the wife to have the dominion over the fee of an estate, by means of a power, the wife appointed, and the husband and wife conveyed the fee by way of mortgage. The estate was really settled to the separate use of the wife for life, with remainder to the husband for life, with remainders over. The mortgage money was decreed to be raised out of the life estates.

By an indenture, which represented that under her marriage settlement, Mrs. Hardisty, by means of a power of revocation and new appointment, had the absolute dominion over the fee simple of an estate, it was witnessed that in consideration of 300*l.* paid to Mr. Hardisty, Mrs. Hardisty, in execution of her power appointed the property to the uses after mentioned, and Mr. and Mrs. Hardisty then conveyed it to the plaintiff, to secure the 300*l.* advanced to the husband.

It appeared, however, that Mrs. Hardisty had no such power, and that the estate was settled to her for life for her separate use, with remainder to her husband for life, with remainders over to other persons.

Mr. Hardisty having become bankrupt, and the mortgage and interest remaining unsatisfied, the plaintiff filed this bill to have the amount due to him raised out of the life estates of Mr. and Mrs. Hardisty. The bill alleged that the plaintiff had advanced his money on the faith of having a security on the fee, but that he afterwards discovered the true state of the title, which had been fraudulently concealed.

[364] The wife insisted that it was the intention of the parties that the fee should be subject to the mortgage, and that on that supposition, and on the faith of the settlement being void, she had joined. That the plaintiff was aware of her actual interest in the property having seen a copy of the settlement, and that he was of opinion that such settlement was invalid and had proposed to run the risk; and she insisted that she was not bound to give effect to the deed out of her separate interest. There was no evidence as to the fact produced by the defendants, nor was there any proof of any fraudulent concealment given on the part of the plaintiff.

Mr. Pemberton and *Mr. Keene*, for the plaintiff, asked for the usual decree for an account and payment out of the life estates of the husband and wife. They cited *Sheldon v. Cox* (1).

(1) 2 Eden, 224.

Mr. Piggott, contrd., for the husband and wife, contended that her separate estate was not liable to the payment of the mortgage money. That she had acted under a misconception of her interest in the property, and that it was intended to make the whole fee liable, and not to throw the burthen on her limited estate. That from the deed it appeared that she was dealing under her supposed power only, and not in respect of her separate estate.

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WRIGHT
v.
HARDISTY.

That there was no case in which a contract had been established against a *feme covert* personally, but only through her trustees against her separate estate under some due appointment of it; so that here, there was neither a contract, nor, according to the intention of the parties, any appointment of the wife's separate estate.

He did not object to the mortgage being charged on the life estate of the husband.

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Mr. Ellis, for a trustee.

Mr. Koe, for the bankrupt's assignee.

THE MASTER OF THE ROLLS :

The principal question in this case seems to me to be, whether the interest of the wife is affected at all. There is no fraud proved by the defendants; and no step has been taken on behalf of the wife to set aside this deed; but the case comes before me simply upon the statement which is made, that the husband having occasion to borrow a sum of 300*l.*, applied to the plaintiff to lend it, and the wife offered as a security to appoint this property; and then the wife says in her answer, that there was some misrepresentation made to her as to the extent of her power over the property, which, however, is not proved. Now, it seems that the interest which was intended to be appointed by the deed is not so appointed, because the terms of the settlement did not allow it. The question is, whether the deed is not to operate upon the interest which the husband and wife had, and upon that which the wife had a power to charge. It is truly said, that there is no personal contract, but then it is also argued that this is a contract with reference to her power, and not with respect to her separate property. I confess I am at a loss to know what it is, if it is not to operate on her separate estate under the settlement, for except in that way it could have no operation: under the circumstances, as they are before me, I think that the deed ought to operate to

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the extent of the interest which the husband and wife had, and that the plaintiff is entitled to the decree he asks.

This is one of the very many cases in which the wife suffers for the want of the clause against anticipation. The separate interest intended for the wife has thus been left unprotected against the necessities and influence of the husband.

CULLINGWORTH v. LOYD (1).

(2 Beav. 385—395; S. C. 9 L. J. (N. S.) Ch. 218; 4 Jur. 284.)

1839.
Nov. 14, 15,
16, 17.

1840.
March 21.

Rolls Court.

Lord
LANGDALE,
M.R.

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Upon a composition between a debtor and his creditors, a creditor cannot ostensibly accept a composition, and sign the deed which expresses his acceptance of the terms, and at the same time stipulate for or secure to himself a peculiar and separate advantage which is not expressed upon the deed.

A creditor holding a security for his debt may stipulate to have the benefit of it, in addition to the amount of the composition offered by a debtor to his creditors; but he must either hold himself entirely aloof from the other creditors, or distinctly communicate with them on the subject, if he at all acts in common with them.

A debtor entered into a negotiation for a compromise with his creditors, but there did not appear to have been any general meeting of them, or any agreement entered into by them generally; one of the creditors stipulated that he should have the benefit of a mortgage security which he held, in addition to the amount of composition. He accepted the composition, but did not then execute the composition deed; he afterwards realised his mortgage security, and then executed the composition deed, by which he purported to release his debtor altogether, without any reservation of the mortgage security; another creditor subsequently executed the composition deed. The agreement was not communicated to the other creditors, but there was no fraudulent concealment: Held, on grounds of public policy, that the creditor was not entitled to retain his mortgage security in addition to the amount of the composition.

A plaintiff partially succeeded, so as to be entitled to costs; but he failed in establishing unfounded charges of fraud, for the costs of which the Court considered him liable. The Court made a decree, without costs on either side.

In the year 1830 the plaintiff and Charles Addy were partners in the business of calico-printers at Manchester, and they had an account with Messrs. Loyd as their bankers. The plaintiff was separately entitled to a certain real estate, called the West Moor estate, which was situate in the county of Durham, and in June, 1830, the plaintiff deposited with Messrs. Loyd the title deeds of this estate, as a security for the balance which might be due to them from the firm of Addy and Cullingworth.

Towards the end of the year 1830, the plaintiff and Addy, being

(1) See *Société Générale de Paris v. Green* (1883) 8 App. Ca. at p. 615.

considerably indebted and embarrassed, determined to wind up their affairs, and on the 31st of December, 1830, they executed a power of attorney, whereby they empowered Edmund Grundy to act for them in that respect, and enabled him to pay the debts of the concern by an equal pound rate, without preference *or priority. The day previous to the execution of this power of attorney, Edmund Grundy called on Messrs. Loyd, who were the principal creditors, and asked the advice of Mr. Edward Loyd as to an intended composition, and the defendant Mr. Edward Loyd thereupon stated that his house would accept a dividend equal with the other creditors, retaining, however, at the same time, the West Moor estate as a security for the balance which would be owing after the dividend had been received. To this Edmund Grundy, acting for the plaintiff, agreed; and he further suggested, that for the purpose of making the security more effectually available, it would be better to convert the equitable into a legal mortgage with a power of sale; and accordingly, by indentures of lease and release, dated the 10th and 11th of March, 1831, the plaintiff mortgaged the West Moor estate to Messrs. Loyd & Co. for 2,024*l.* 1*s.* 2*d.*, and thereby gave them a power of selling the mortgaged property in case of default being made in payment of principal and interest on the 10th of September, 1831.

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What was done by Grundy in the mean time for winding up the partnership business or promoting the composition, no further appeared in the cause than this, that he caused a deed of release to be prepared for execution by the creditors.

This deed, which was dated the 21st of October, 1831, recited that Addy and Cullingworth, being unable wholly to discharge their debts, had proposed to pay their creditors a composition of 10*s.* in the pound, which the creditors had agreed to accept in full satisfaction of their several debts. And it purported to witness, that each creditor executing the deed released Addy and Cullingworth from the debt owing by them to him, and all interest *due thereon, and also from all securities given by Addy and Cullingworth, or either of them, for securing payment of such debt; provided that any creditor might be at liberty to execute the deed without prejudice to any other lien or security which he might have for the debt against any other person.

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In the months of September and October, 1831, advertisements were published, giving notice to the creditors that they might receive a dividend of 10*s.* in the pound on their debts on executing

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the release, and several creditors executed the deed; but it did not appear that there was any general meeting of the creditors, or any agreement entered into by the creditors generally.

Sometime after the publication of the advertisements, and on the 13th December, 1831, Mr. Edward Loyd received from Edmund Grundy the sum of 1,012*l.* 7*s.* 7*d.*, being the amount of the composition of 10*s.* in the pound on the whole debt due to the defendants. At the time when the payment was made the deed was not executed, and it was agreed between Edward Loyd and Grundy who represented the plaintiff, that the defendants should have the benefit of the security for the recovery of so much as they could of the remaining moiety of the debt.

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The dividend was received in December, 1831, and soon afterwards Mr. Edward Loyd proceeded under the power to sell the estate. An agreement to sell for 800*l.* was entered into with Lord Howden on the 1st of February, 1832, and was made under circumstances which gave rise to another question in this case. The purchase, however, was completed, and the purchase-money received by the defendants on the 1st of May, *1832, and it was applied in reduction of the debt which remained due to the defendants after they had received the composition; and on the 29th of June following Mr. Loyd executed the deed. All the other creditors, with the exception of one who executed afterwards, had previously executed the composition deed.

It did not appear that the arrangement entered into between the plaintiff, by Mr. Grundy, and Messrs. Loyd was communicated to the other creditors.

This bill was filed in June, 1832, to set aside the mortgage of 1831, and insisted that by the execution of the composition deed the defendants, Messrs. Loyd, had given up their security upon the West Moor estate; and by amendments made in 1836 and 1837, personal fraud was charged against the defendants, and the sale to Lord Howden was sought to be set aside. All relief against his Lordship was however abandoned at the hearing.

Several creditors were examined, who proved, that they believed when they executed that all the creditors had agreed to accept the composition; and some stated that they would not have accepted the composition if they had known that Messrs. Loyd were to retain their securities in addition.

Mr. Pemberton, Mr. Kindersley and Mr. K. Parker, for the

plaintiff, contended, that the legal mortgage of March, 1831, had been improperly obtained. That by the established rule of law, the defendants, Messrs. Loyd, being parties to the composition deed, could not retain any advantage over the other creditors not expressed in the deed, or distinctly and clearly communicated to the body of creditors; and that by the *course of dealing in this case they had given up their claim upon the mortgaged estate; that the sale to Lord Howden was improvident and at an under value, and was made under such circumstances as to render the defendants liable for the whole value.

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Mr. G. Richards, Mr. S. Sharpe and Mr. Mylne, for Messrs. Loyd, contended that there was no general agreement between the debtors and the creditors in this case, but a separate arrangement with each; that the defendants had always expressly and openly reserved their rights in respect of the mortgage, and that there had been no fraud or intention to conceal the terms of the arrangement. That the deed had not been executed until the security had been realised; and that the other creditors, except one, having executed the deed previously to Mr. Loyd, could not have been misled by it.

They argued also, that the sale had been proper, and for the full value at the time.

THE MASTER OF THE ROLLS :

The object of this bill is to have it declared, that a mortgage executed by the plaintiff to the defendants, Messrs. Loyd & Co., was not properly obtained, and to have the mortgaged estate reconveyed, or the value thereof paid by the defendants to the plaintiff.

1840.
March 21.

On the 30th of December, 1830, when the first transaction between Grundy and Mr. E. Loyd took place, Mr. Loyd was entitled to insist on the benefit of his *security, and of all the other means which the law allowed him for recovering his debt; and with reference to the contemplated composition with all the creditors, he had a right to say as he did,—that he would not come into the agreement or arrangement for the composition unless he were allowed to make his security available for the residue of his debt; but this was a right which, considering the way in which the interests or the intention of other creditors might be affected by it, Mr. Loyd could not act upon without either holding himself entirely

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aloof from the other creditors, or distinctly communicating with them on the subject if he acted in common with them at all. I think also that at the time to which I am referring, Mr. Loyd had a right to say that he would not accept the dividend unless upon the terms of having his security converted into a legal mortgage, with a power of sale; and upon a consideration of the evidence, I am of opinion that the legal mortgage, which was not executed till after the lapse of more than two months from the suggestion of Edmund Grundy, was not improperly obtained. Whether the defendants were, under the circumstances which afterwards occurred, entitled to the benefit of the mortgage, is the next question to be considered.

The composition was contemplated and the power of attorney to Grundy was given in December, 1830, the mortgage to the Messrs. Loyd was executed in March, 1831, and the power of sale attached in the following month of September.

[*391] It must be observed that Edmund Grundy was winding up the business under a power of attorney, which enabled him to pay the debts by an equal pound rate; but it does not appear that there was any general meeting of the creditors, or any agreement entered into by *the creditors generally. The advertisements, however, show a proposition to the creditors at large to pay them all a composition on certain terms; and although every creditor was at liberty to refuse the composition, it is established by a series of decisions, that a creditor cannot ostensibly accept such composition and sign the deed which expresses his acceptance of the terms, and at the same time stipulate for or secure to himself a peculiar and separate advantage which is not expressed upon the deed; and in the case of *Leicester v. Rose* (1), it is stated by Mr. Justice LE BLANC, that in the consideration of cases of this nature, it is not material whether the agreement be entered into at a meeting of all the creditors assembled for the purpose, or impliedly by their affixing their signatures to the same deed carried round or produced to each separately, and signed by them: those who, by executing the deed, hold out that they come in under the general agreement, are not permitted to stipulate for a further partial benefit to themselves.

The deed not being executed by Edward Loyd, there was up to this time nothing in common between him and the other creditors: so far from agreeing to the terms expressed in the deed, one of which was, that securities given by Addy and Cullingworth, or either of them, should be given up, he had expressly refused to do

so, and that for the expressed and avowed purpose of retaining his right to make the security available for so much of the debt as was not discharged by the composition. He appears to have understood that the stipulation which he made for himself and his partners was to be made known to all the creditors, but he did not himself take any means to make it known.

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On the 29th of June, 1832, Mr. E. Loyd executed the deed, and thereby, for the first time, brought himself into community with the other creditors who had executed or might afterwards execute it. He had, in fact, received the same dividend as the other creditors, and had besides availed himself of the security given to him by the plaintiff; and although he seems to have considered, that as he had realised the security he might safely release the plaintiff and retain his advantage (as indeed I conceive he might have done by a proper method of proceeding), yet the question remains, whether after execution of the deed any other creditor could have understood, that between the time when he received the dividend and the time when he executed the deed he had realised the securities which the deed purported to release. It was, indeed, argued, that the securities mentioned in the deed were only mercantile securities, but it is evident that Mr. E. Loyd himself did not so construe the deed; and considering that no explanation of Mr. E. Loyd's signature was endorsed on the deed,—that no notice was given upon the deed that Mr. Loyd had received both the composition and the produce of the security, it appears to me that the same principles of public policy which have governed other cases of this kind will deprive Mr. Loyd of his right to retain the advantage which his execution of the deed purported his intention to release; and in this respect, though not for all purposes, I think that his execution of the deed must, in equity, have the same effect as if he had executed the deed on the same day on which he received the dividend.

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There is besides evidence, which, though not very distinct, may be relied on, to show that there was at least one creditor who watched the conduct of Messrs. Loyd, the largest creditors, and refused to sign until *the Messrs. Loyd had done so; and although Mr. E. Loyd appears to have stated at the time, to the person who asked him to sign, that having realised his securities he would sign (and this shows there could be no intention to mislead), yet the fact of his intention to avail himself of his securities was not so stated as to guard other creditors from being misled; and under all the circumstances, I am of opinion, that having received the

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dividend and executed the deed, Messrs. Loyd had no right to retain the benefit of the money which arose from the security.

The next question is, whether Messrs. Loyd ought to be charged with more money, as the value of the estate, than the amount of the purchase money which they received from Lord Howden. The plaintiff has by his bill charged fraud against the defendants Messrs. Loyd, and against Lord Howden, and has prayed for a reconveyance of the estate; but the attempt to recover the estate from those who claim under Lord Howden has been abandoned, and the claim now is, that Messrs. Loyd, having sold the estate improperly, and at a greatly inadequate value, ought to be charged with the real value, to be now ascertained.

(His Lordship having gone minutely into an examination of the evidence on this point came to the following conclusion:)

Looking at all the circumstances, and even considering Mr. Loyd to be a trustee for the plaintiff, which in one sense he was, I think that there is nothing in the conduct of Mr. Loyd respecting the sale of which the plaintiff has a just right to complain. Having himself given the power of sale, knowing the purpose for which it was intended to be exercised, the means which had *been taken to ascertain the value and the amount of the valuation, and having attempted to avail himself of the opportunity, which was afforded him, of preventing the sale by raising money, and having expressed his satisfaction at the promise not to sell for less than 800*l.*, and having, under these circumstances, permitted Mr. Loyd to sell, I think that the plaintiff cannot afterwards be himself permitted to say that the sale was made without his authority.

As to the value, there are estimates of great amount produced on behalf of the plaintiff, but we are not to consider the speculative value founded on estimates of the quantity of coal contained in the land, or the possible improvement in consequence of a railway then in contemplation, but the value of the land to be sold at the time, or what the estate would probably have sold for by public auction; and having given the best attention in my power to the evidence, it does not appear to me that more than the 800*l.* paid by Lord Howden would probably have been obtained, and I am therefore of opinion that the defendants are not to be charged with more than the purchase money which they received from Lord Howden.

Declare that the defendants Messrs. Loyd, having executed the deed of the 21st of October, 1831, and having received the

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composition or sum of 10*s.* in the pound upon their said debt, are not in respect of the said debt or sum of 2,024*l.* 15*s.* 2*d.* due to them from Addy and Cullingworth, entitled to retain and apply the said purchase money or sum arising from the sale of the estate comprised in the indentures of the 10th and 11th day of March, 1831, in further reduction of the said debt; and decree the defendants to pay to the plaintiff the clear amount of such purchase money, *and interest thereon at 4 per cent. from the time when the same was received.

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On a consideration of the costs of this suit, and having regard to the many unfounded charges of fraud contained in the bill, which make the plaintiff liable to considerable costs, and also to the defence which has failed, and in respect of which the defendants are liable to considerable costs, it appears to me that the justice of the case will be best answered by making a decree to the effect I have stated, without giving any costs to either side.

WIGGINS v. PEPPIN.

(2 Beav. 403—408; S. C. 3 Jur. 721.)

A joint and several answer filed for two persons, by a solicitor having authority from one only, will not be ordered to be taken off the file on the application of one party in the absence of the other.

The retainer of a solicitor need not be in writing, but if he neglects taking that precaution, and his retainer being afterwards questioned, there is nothing but assertion against assertion, he must bear the cost of the risk he thus undertakes.

A motion for the taxation of a solicitor's bill, with special directions to disallow the costs of certain proceedings alleged to have been improperly taken by the solicitor, or with a qualification that the taxation was to be of the costs of such proceedings only as had been properly incurred, refused, as such objections may be taken advantage of under the common order for a taxation.

A BILL had been filed to which a trustee had been made a defendant; he died before answering the bill, and a common bill of revivor was thereupon filed against his executors, William Clarke and Lydia Spriggs, in which no accounts were prayed. William Clarke alone, without any authority from Lydia Spriggs, gave directions to Messrs. D. and A., solicitors, to do what was necessary for the executors in the suit.

Some time afterwards Lydia Spriggs and William Clarke gave a retainer in writing to another solicitor, Mr. V., but Messrs. D. and A., acting under the previous authority, proceeded to enter an

1837.
Dec. 19, 22.

1839.
June 24.
July 19.

Rolls Court.

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appearance for William Clarke and Lydia Spriggs, and filed their joint and separate answer, without oath or signature.

A motion was now made, on behalf of Lydia Spriggs alone, to take off the file a parchment writing purporting to be the joint and several answer of William Clarke and Lydia Spriggs.

Mr. Pemberton and Mr. G. L. Russell, in support of the motion.

Mr. Bethell, *contra*.

Dec. 19.

THE MASTER OF THE ROLLS:

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With reference to William Clarke, who has answered jointly with Lydia Spriggs, it is necessary to consider the terms of the order proper to be made.

I am, however, of opinion that a solicitor has not, without authority, a right to enter an appearance or put in an answer for an individual.

The circumstances of this case are really extremely simple: (his Lordship stated the above circumstances).

A considerable time after William Clarke had given the directions to Messrs. D. and A., Lydia Spriggs and William Clarke gave a retainer in writing to Mr. V., another solicitor, to attend to their interest in this cause; but notwithstanding this retainer in writing given to another solicitor, Messrs. D. and A., acting on the supposed authority which they had received from William Clarke, the brother, proceeded to enter an appearance, not for him only, but for Lydia Spriggs, from whom they had no direct authority, and as to the supposed authority from whom, they solely trusted to William Clarke. They not only entered an appearance for her, but they took on themselves to file a joint and several answer for her and William Clarke.

I believe it has been decided more than once, that it is not necessary that an authority given to a solicitor should be in writing; further, it has been said—that it is the duty of the solicitor to take care that he has sufficient evidence of the authority; and if he neglects the precaution of obtaining it in writing, and his authority is afterwards challenged, he will, for want *of written evidence, be treated as if he had no authority at all; I think the cases go to that length.

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Then how is it in this case? The solicitors have no authority whatever, they never had any communication with this lady, and they have trusted wholly to her brother. She denies that she ever gave any such authority, and has given a retainer in writing to another solicitor; Messrs. D. and A., in consequence of not using

proper precaution, have filed an answer and have incurred expenses without any authority from her.

WIGGINS
F.
PEPPIN.

Then comes the question, whether a solicitor has a right, without any authority from or communication with the party, to appear for him in the cause, to take upon himself to say that an answer without oath or signature may be safely put in, and accordingly to put in such answer. It would, I think, be very improper to afford any countenance to such a proceeding (1).

I have no doubt on the merits of this case, but I shall consider the terms of the order, so far as respects the interest of William Clarke. I desire, for my own satisfaction, to look into the authorities that bear on this subject.

THE MASTER OF THE ROLLS :

I have looked at the authorities, and they entirely bear out the opinion I expressed the other day, that if an authority be not given in writing, and the authority is denied, and there is nothing but assertion against assertion, the solicitor must bear the costs of the risk he thus undertakes (2); at the same time there may be *subsequent conduct, from which an acquiescence may be inferred, and that will make a difference. There is nothing of that description here, and if this motion had been regularly brought on, I should have no doubt as to the order to be made, to take off the file a parchment writing purporting to be the joint and several answer of William Clarke and Lydia Spriggs; it is impossible, however, to do that in the absence of William Clarke, and William Clarke not being served in the regular way, I am afraid I cannot, in the present state of things, make any order: I cannot in his absence do that which I am asked to do.

Dec. 22.

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Lydia Spriggs subsequently discharged Mr. V. and retained Messrs. D. and A. in the suit; the motion was not therefore prosecuted. Mr. V. having delivered his bill of costs to Lydia Spriggs for these proceedings, amounting to 88*l.*, commenced an action for the amount, and arrested her.

A motion was afterwards made on her behalf before the Lord Chancellor, to restrain proceedings in the action. His Lordship, however, refused the application.

It was now moved, before the Master of the Rolls, on behalf of

1839.
June 24.

(1) For the modern practice, see Ch. 231, 41 L. T. 637.

Newbiggin-by-the-Sea Gas Co. v. Armstrong (1878) 13 Ch. Div. 310, 49 L. J.

(2) See *Wright v. Castle*, 17 R. R. 3

(3 Mer. 12).

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 PEPPIN.

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the defendant, Lydia Spriggs, that it might be referred to one of the Masters of this Court to tax the bill of costs amounting to 88*l.* 2*s.* 9*d.*, delivered by Mr. V. to her, other than and except the costs of certain proceedings mentioned in the notice of motion, which it was prayed might be wholly disallowed; or otherwise that the Master might tax the cost of all the proceedings which had been properly taken on behalf of the *defendant Lydia Spriggs, and that Mr. V. might be restrained from all proceedings in the action at law brought by him against Lydia Spriggs.

Mr. Bethell, in support of the motion, contended, that this lady ought to be relieved from the costs of a proceeding quite unwarranted, which, from the commencement, it must have been apparent would terminate unsuccessfully, and from which she could not by possibility have derived any benefit.

Mr. Pemberton and *Mr. G. L. Russell*, *contrà*, contended that the retainer having been proved, Lydia Spriggs was entitled to the common order for taxation only; that no special directions could now be given to the Master to proceed in any other than the ordinary mode in the taxation of the bill of costs; and that under the common order, the Master would take notice of all objections.

July 19.

THE MASTER OF THE ROLLS :

Lydia Spriggs having retained and employed Mr. V. as her solicitor, and Mr. V. having delivered his bill of costs, she is entitled to the common order for taxation of the bill, on the usual terms. The question is, whether she is entitled to any other or different order.

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Lydia Spriggs and her brother, a Mr. Clarke, were defendants to a bill of revivor: Mr. Clarke, as Lydia Spriggs has sworn, without her authority, employed Messrs. D. and A., as solicitors, to act for both; and those gentlemen thereupon appeared and put in an answer for both, without oath or signature. Lydia Spriggs, however, thought fit, or was induced, not to acquiesce in that proceeding; and on the suggestion, as it seems, of Mr. *Shuttleworth, she retained and appointed Mr. V. to act for her; he did so, and adopted proceedings on her behalf, to have the answer put in for herself and her brother taken off the file. Before these proceedings were brought to a close, she dismissed Mr. V., and thought fit, or was induced, to employ the solicitors who were first engaged on her behalf by her brother.

Mr. V.'s bill was incurred in these proceedings, and she now desires that the reference for taxation may be accompanied by a

disallowance of the greatest part of the bill, or by a qualification, that the taxation is to be of the costs of such proceedings only as have been properly incurred.

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PEPPIN.

It appears, from the facts stated in the affidavit, that the case of Lydia Spriggs is a very unfortunate one: she has been led into an expense which turns out to be entirely useless, and was probably led into it by the competition of two solicitors, who, after all that has passed, would have done well to unite their endeavours to save her harmless; but the case is clear that she retained Mr. V., and by two affidavits, one made in July and the other in November last, she recognises the retainer, and insists upon his being her solicitor; and when he has thus acted under her authority, thus solemnly recognised and confirmed, and in the absence of any fraud, the question is, whether there ought to be any special direction or qualification in the order for taxation, and I think that there ought not (1).

THE ATTORNEY-GENERAL v. KERR.

(2 Beav. 420—430; S. C. 9 L. J. (N. S.) Ch. 190; 4 Jur. 406; form of decree, 3 Beav. 427, n.)

1840.
March 14, 16,
31.

Rolls Court.
Lord
LANGDALE,
M.R.
[420]

Absolute alienation and a reversionary lease of charity property set aside, as improvident. [See now the Charitable Trusts Acts, 1853 (s. 26) and 1855 (a. 29).]

Valid lease of charity property, which had merged in the fee by an invalid absolute conveyance to the lessee, sustained on setting aside the latter on an information by the *Attorney-General*.

A lessee of charity property obtained a further reversionary term, and afterwards made considerable lasting improvements on the property; the reversionary lease being set aside, the Court considered the lessee entitled to compensation for money laid out by him in reference to the extended enjoyment.

Municipal corporations, as altered by the Municipal Corporation Act (5 & 6 Will. IV. c. 76) (2), are but a continuance of the old corporations; and where the new corporation was made party to a suit, in respect of a breach of trust committed by their predecessors, it was held they were not entitled to costs (3).

THE object of this information was to set aside an absolute conveyance and two reversionary leases, which had been made by trustees of charity property.

(1) An appeal was presented to the Lord Chancellor, who, having ascertained the practice to be, that the Masters, under the common order for taxation, would take into their consideration the objections here com-

plained of, affirmed the order of the MASTER OF THE ROLLS.

(2) Repealed by 45 & 46 Vict. c. 50, s. 5.

(3) On this point see *A.-G. v. Wilson*, 47 R. R. 173 (9 Sim. 30).—O. A. S.

A.-G.
v.
KERR.

It appeared that the corporation of Northampton was possessed of property, containing about one acre and a quarter, in that town, under the will of a testator, dated in 1683, by which he had devoted it "to and for the use and yearly benefit of the poor people of St. Thomas's Hospital, in the said town of Northampton, for ever," of which hospital the corporation were trustees.

In 1745 the corporation had granted a lease of the property for a term of twenty-one years, at a rent of 8*l*.

[421] In 1763, before the expiration of the former lease, they granted a reversionary lease of the same property to the same lessee, for a term of twenty-one years, commencing from 1766, at a rent of 8*l*., and a fine of 25*l*.

In 1769, at which time eighteen years of the second lease of 1763 were unexpired, the corporation granted to Dodd, the then lessee, a reversionary lease of the same property for sixty years, to commence in 1787, for the further term of sixty years, at the yearly rent of 9*l*., and Dodd covenanted to take down the present messuage and rebuild one or more substantial dwelling houses, and keep them in repair.

On the 10th December, 1784, the residue of the two terms created by the indentures of 1763 and 1769 were, in consideration of 241*l*., and with the license of the corporation, assigned to Dr. Kerr.

On the 18th December, 1784, the corporation granted to Dr. Kerr a further reversionary lease of the property for a term of thirty-nine years, to commence at Michaelmas, 1847, at the yearly rent of 18*l*., and Dr. Kerr covenanted to build one or more good and substantial messuages or tenements, with convenient out-offices, on some part of the said demised ground, and thereon to lay out and expend the sum of 500*l*.; and in case he should take down the building then being thereon, that in such case, he would, instead thereof, erect and build one or more good and substantial messuages, with convenient out-offices thereto, or on some part of the said demised premises, and therein lay out and expend the sum of 1,000*l*., and afterwards keep the said erections and buildings in good and tenantable repair.

[422] At the time of granting this lease there was a term of sixty-two years and three quarters unexpired of the old leases, and which, being added to the new reversionary term of thirty-nine years, made a period of 101 years and three quarters. Dr. Kerr, having obtained these leases, laid out considerable sums on the property, and, by indenture reciting that Dr. Kerr had laid out more than

500*l.*, and that the corporation were convinced that it was for the benefit of the charity, the corporation, in consideration of the surrender of the two last leases, and of the fee-farm rent reserved, conveyed the property absolutely to Dr. Kerr, subject to a clear yearly fee farm rent of 12*l.*, and a fine of 10*s.*, at the end of twenty-one years for ever, and the corporation covenanted for quiet enjoyment.

In these various transactions the parties had notice that the property belonged to a charity.

The defendant Osborne was the warden of the hospital, appointed by the old corporation. Under the Municipal Corporation Act (5 & 6 Will. IV. c. 76) the old corporation was changed, and by the same Act (1) charitable and trust estates vested in the corporation were to continue vested in the persons, who, at the time of the passing of the Act, were trustees, until the 1st of August, 1836, or until Parliament should otherwise direct; and in default of any such direction before the 1st of August, 1836, the LORD CHANCELLOR was empowered to make such orders as he should see fit for the administration of such trust estates.

This information was filed against the representatives of Dr. Kerr, the new corporation of Northampton, and Osborne, insisting that the reversionary leases were improvident, and ought to be set aside, and that the *absolute conveyance to Dr. Kerr was invalid, and it insisted that the present corporation was liable for the defaults of the old.

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Evidence was entered into in support of the information to show, from the facts stated in the above documents, and from the present value of the property, the improvidence in the mode which had been adopted of dealing with this trust property, and the loss which the charity had sustained. The present value of the property was estimated at about 6,700*l.* On the other hand, the evidence on the part of the representatives of Dr. Kerr showed that when he took possession the property consisted of an irregular piece of ground, formerly a gravel pit, of very little value; that he had filled it up, built a handsome residence, with stables, hothouse, gardens, &c., and had expended upwards of 5,000*l.* thereon.

It appeared also that the value of property in the town had of late very considerably increased, in consequence of the increase of the population.

Mr. Pemberton, Mr. G. Richards, and Mr. O. Anderdon, in support of the information, contended that the alienation of the fee

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simple of a charity estate could not be supported on any principle ; that it was a breach of trust on the part of the trustees, of which the purchaser had notice, and that it must therefore be set aside *in toto* ; that there would then be no necessity for setting aside the leases, as they had merged at law, and no bill had been filed by the representatives of Dr. Kerr to set them up, besides which, the leases themselves were, as they contended, invalid. They were, in the first place, granted in reversion, a course quite inconsistent with a provident dealing with trust property ; they were, besides, of an extreme length, the extent of *the two terms, in 1784, being more than 100 years : *The Attorney-General v. Lord Hotham* (1). * * *

Mr. Kindersley, Mr. G. Turner, Mr. D. James, Mr. B. Parry, Mr. L. Wigram, Mr. Stuart, Mr. Keene, Mr. Bacon, and Mr. Jeremy, contended that there was no positive rule which rendered the alienation of charity property invalid : [*Attorney-General v. Warren* (2) ; *Attorney-General v. Hungerford* (3).]

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As regarded the leases, they urged that the fact of their being reversionary, and for a long term, was not *sufficient to invalidate them ; that some fraud must be proved, and that it must be shown that no persons meaning fairly to discharge their trusts, would have resorted to that mode of letting : *Attorney-General v. Cross* (4). * * That if the leases had merged, still, as the legal estate was in the defendants, the Court, if it set aside the conveyance, would not deprive them of the whole legal interest, so as to defeat the leases ; and, lastly, that if the transaction were set aside, the defendants ought to be allowed for the amount of their outlay and improvements on the property.

They argued, also, that the great lapse of time, if not a bar, ought yet to influence the Court favourably towards the defendants : *Attorney-General v. Caius College* (5), *Attorney-General v. Pembroke Hall* (6). * * *

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Mr. K. Parker for Osborne.

Mr. Tinney and Mr. Hardy for the present corporation of Northampton. * * *

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| (1) 24 R. R. 21, 27 (T. & R. 209, 216). | (4) 17 R. R. 121, 122 (3 Mer. 524, 539). |
| (2) 19 R. R. 74 (2 Swanst. 291, 302). | (5) 44 R. R. 212 (2 Keen, 150). |
| (3) 37 R. R. 145 (8 Bli. 437, and 2 Cl. & Fin. 357). | (6) See 25 R. R. 244 (2 Sim. & St. 441). |

Mr. Bethell and *Mr. Whitworth* for the new trustees of the charity, who had been brought before the Court by supplemental bill.

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Mr. Pemberton, in reply :

If the leases have merged in the void conveyance, the *onus* is on the defendants to show an equity to re-establish them.

THE MASTER OF THE ROLLS :

With respect to the conveyance of the fee, and notwithstanding the evidence which has been gone into, it appears to me, and it seems to have been felt by those who have so ably argued this case, that it would be *utterly irreconcilable with every principle on which charity property can be advantageously dealt with to allow such a transaction as this to stand. It has been truly said, that when a considerable benefit would be gained to a charity, the Court itself would order an alienation of charity property ; and from this it is argued that on clear and decided evidence of its being manifestly for the benefit of the charity, a trustee might be justified in doing that which under similar circumstances the Court itself would do ; such cases have certainly from time to time been put, but this is not one of such cases. I apprehend that there can be no doubt whatever in any ordinary mind, that the last transaction here complained of must be set aside.

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That being so, then arises the question, whether the former transactions ought to be sustained. As to granting leases of charity property, it is certainly a strong proposition to lay down, that the trustees of a charity have the same powers which a prudent owner has with respect to his own property : there may perhaps be *dicta* which go almost to that extent, but I apprehend that much more is expected from trustees acting for a permanent charity, than can be expected from the ordinary prudence of a man in dealings between himself and other persons. A man acting for himself may indulge his own caprices, and consider what is convenient or agreeable to himself, as well as what is strictly prudent, and his prudential motives cannot afterwards be separated from the others which may have governed him. Trustees of a charity within the limits of their authority, whatever they may be, should be guided only by a desire to promote the lasting interest of the charity.

Without entering into the question upon whom the *onus* of proof lies in such a case as this, I must say, that on looking into these transactions, and having regard to *their nature, and the evidence

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as to the state and value of the property at the time, I am not satisfied that the lease of 1769 was an imprudent transaction, and therefore I do not think that I can set it aside.

With respect to the lease of 1784, looking again at the evidence of the value so long ago as the year 1763, at the length of the lease then subsisting and unexpired, and considering that it could not by possibility be prudent or advantageous to the charity, to add to that long reversionary term of sixty-two years and three-quarters already existing, a further reversionary term of thirty-nine years, and having regard to the covenant contained in that lease, I do not think that it is a lease which can be sustained. I must set aside the conveyance of 1791, and the lease of 1784, but not disturb the lease of 1769.

The charity having equity, must on its part do equity, and the question is, what ought to be done with regard to the very great and valuable expenditure which has been made? If it has been made with reference only to the enjoyment under the existing lease of 1769, nothing will be due; but if it has been made, not only with reference to the beneficial enjoyment under the first lease, but in consequence of the extension of the lease in 1784, then I think, it would be no more than just and reasonable towards the estate of Dr. Kerr, that some compensation should be made to him in that respect. Some inquiry must be had for the purpose of ascertaining (if it be susceptible of ascertainment) what, if anything, has been laid out with reference to the extended enjoyment which Dr. Kerr was led by the corporation to suppose he was entitled to, and which he would not otherwise have laid out; but no ornamental expenditure can be allowed.

[430] I cannot give the corporation any costs. I consider it to be a continuing corporation: though it is very common *to designate the corporation in its old state, and in its new state, as the old corporation and the new corporation, yet for the purposes here in question there is no distinction between them. It is the same corporation under a new government. The act of this corporation having rendered these proceedings necessary, I cannot give them their costs.

[3 Beav.
427, n.]

[The decree declared] that the estate of the said William Kerr will, upon the determination of the said term granted by the said lease of the 4th of January, 1769, be entitled to have allowed out of the charity estate, compensation for the increased annual value,

if any, to the charity at the time of the determination of the term granted by such lease of the said lands and premises comprised therein, arising from or occasioned by the expenditure of the said William Kerr and the said Mary Kerr after his decease, before the filing of the information in the above mentioned cause, in and upon the said land and premises, beyond what the annual value of the said land and premises would have been to the said charity at the time of the determination of such lease, supposing the covenants therein contained to have been duly performed; such compensation, if any, to be computed with reference to the additional term intended or expressed to be granted by the said lease of the 18th of December, 1784.

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(2 Beav. 430—442; S. C. 9 L. J. (N. S.) Ch. 234; 4 Jur. 213.)

A trustee who was directed by the will of the testator to invest the residue in Consols, and to accumulate the dividends, invested it on mortgage of real estate: he was held liable to make good the amount of stock which would have been purchased in Consols, together with the amount of accumulation which would have been produced by a proper investment of the dividends of such stock.

A trustee guilty of a breach of trust, allowed the general costs of an administration suit as between solicitor and client, but was ordered to pay so much as had been occasioned by his breach of trust.

Property was directed to be accumulated for such children as A., B., and C. should leave at their deaths; with power to the trustee to apply such part of the income, as in his judgment might be proper, for their education and maintenance during their minority, and for their future advancement in life: Held, as to a daughter of C., that the power for maintenance did not cease on her marriage, but that it ceased on her attaining twenty-one: and as to the power of advancement, that it continued, notwithstanding she had attained twenty-one and had married, and notwithstanding the period for accumulation limited by the Thellusson Act had expired (1).

THE testator Thomas Webb by his will, dated in 1805, after certain devises and bequests, gave and devised all his freehold and personal estate, and the sum of 7,000*l.* stock in the 3 per cent. Consolidated Annuities, to the defendant Thomas Fooks upon trust, with all convenient speed, to sell his estates, and after payment of his debts, funeral expenses, and legacies, in trust to place and invest

(1) "The question as to maintenance and advancement was not much litigated here, but all parties were anxious for their continuance. I do

not therefore look on that case as a very high authority:" per Lord LANGDALE, M.R., in *Conolly v. Farrell* (1845) 8 Beav. 351.—O. A. S.

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all the residue in the name of Thomas Fooks in 3 per cent. Consolidated Annuities, in addition to the said stock of 7,000*l.* already there, and the testator directed that Thomas Fooks should from time to time receive the interest or dividends arising from the whole of such funded *property, and after paying and discharging the several annuities thereinbefore bequeathed, invest, and place the residue of such dividends and interests in the name of the said Thomas Fooks in the said 3 per cent. Annuities in augmentation as well of the said stock of 7,000*l.* already there, as of the addition or accumulation from time to time to be made thereto, by and out of the said trust estate, which the testator directed should continue to be increased in such manner, and remain vested in Thomas Fooks, in trust for and for the only benefit of such child or children as his nephews and niece Walter, Thomas, and Dorothy should leave at the time of their respective deceases, and to be paid and divided as follows, that is to say, one third part thereof to the child or children of the said Walter Pride, and if but one child only, then the whole to such only child, but if more than one, then unto all such children in equal proportions, and the two remaining third parts thereof to the child or children of the said Thomas and Dorothy in like manner; and in case either of his nephews and niece should happen to die without leaving any children or a child lawfully begotten, then he directed that such third part should go and be paid to the children or child of the other or others leaving children or a child in equal proportions, if more than one. And in case all his said nephews and niece should happen to die without leaving any issue lawfully begotten, then he directed that the whole residue of his said estates should go and be paid to the three children of Peter Gapper deceased, by Jane his wife, in equal shares and proportions. And the testator authorised the said Thomas Fooks from time to time “to apply so much and such part of the income of his said estate as in his judgment might be sufficient and proper, for the education and maintenance of the children of his nephews and niece during their minority, and for their future advancement in life.”

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The will contained the usual trustee clauses, that he should only be accountable for losses happening through his wilful neglect and misconduct, and that he might reimburse himself all costs, charges, and expenses.

The testator died on the 17th of December, 1808, and Fooks, who proved his will, received in March, 1810, a sum of 6,275*l.* which he

invested on a mortgage of real estates. By this bill which was filed by Walter Pride (since dead) and Dorothy Worsdale, it was sought to charge the defendant Fooks with a breach of trust in thus investing the fund, instead of laying it out in Consols, pursuant to the trusts of the will, and to make him responsible for such a sum as would have been produced, if the fund had been properly invested, and the dividends accumulated; the bill also prayed that the interest of all parties in the residue might be declared, and that the usual accounts might be taken.

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The only children of the testator's nephews and niece were the two daughters of Dorothy, namely, Elizabeth Anne, who was born in October, 1799, and married Francis Cottle in January, 1819, and died in 1827 leaving three children; and Caroline Frances, who was born in January, 1811, and married George Fowler in June, 1829. To these daughters and their families the trustee had made advances as after stated.

When the cause came on in July, 1835, it was declared that the accumulations ought to have ceased on the 17th of December, 1829; and as to the breach of trust it was declared that the 6,275*l.* received by Fooks in March, 1810, ought to have been invested in Consols according to the trusts of the testator's will, and it was referred to the Master to enquire what sum of 3*l.* per cent. Annuities, according to the market price, might have been purchased *with the 6,275*l.* on that day, and what sum of stock would have arisen from the accumulations of the dividends of such stock from the 25th day of March, 1810, to the 17th of December, 1829, if the same had been accumulated pursuant to the trusts of the testator's will; and it was declared that the defendant Fooks was bound to make good the same. The Master was also directed to enquire, what sums had been paid or allowed by Fooks for the maintenance, education, or advancement in life of the respective children of the testator's nephews and niece.

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The Master by his report, dated the 12th of July, 1838, found that the sum of 6,275*l.* would have purchased 9,110*l.* 3 per cent. Consols on the 26th of March, 1810; and that 10,510*l.* 3 per cent. Consols would have arisen from the accumulation of the dividends on the 9,110*l.* 3 per cent. Consols from the 26th of March, 1810, to the 17th of December, 1829, if the same had been accumulated.

As to the maintenance and advancements he found the circumstances hereinafter stated. It appeared also from the accounts

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that Fooks had from 1809 to 1834 retained balances of the trust monies in his hands, varying from 2,600*l.* downwards.

The cause now came on for further directions, and at this time both the nephews had died, without leaving any children.

The questions which now arose were as follows :

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First, as to whom the accumulations of the trust fund, subsequent to December, 1829 (being twenty-one years from the testator's death) belonged, such subsequent *accumulations being void under the Thellusson Act (1).

The second question arose, under the power of maintenance and advancement, out of the following circumstances which appeared upon the Master's report :

On the marriage of Mrs. Cottle, the daughter of the testator's niece Dorothy, which took place in January, 1819, a settlement was made. The husband was a schoolmaster, and, not succeeding in his profession, the trustee, at the request of the plaintiffs Walter Pride and Dorothy Worsdale, was induced to make various advances, to the amount, in the whole, of 650*l.*, for the maintenance of Mrs. Cottle and her family ; at what times the several sums constituting this aggregate amount were advanced did not appear ; but Mrs. Cottle, having been born in October, 1799, and married in January, 1819, she was then only nineteen years old, and some of the sums may have been advanced before and others after she attained twenty-one years of age. The allowance of any part of these advances of 650*l.* to Mrs. Cottle and her family was objected to.

Mrs. Cottle died on the 30th of April, 1827, leaving issue three children, and leaving her husband in poor circumstances ; and the trustee, Mr. Fooks, after her death, advanced to her surviving husband 50*l.* a year for the five following years, to enable him to support the three children, the issue of the marriage. The allowance of this sum was objected to by those who might become entitled to the fund in the events provided by the will.

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Mrs. Fowler, the other daughter of the testator's niece Dorothy, married in June, 1829, when she was between *eighteen and nineteen years of age. She married without the advice or knowledge of the trustee, and no settlement was made upon her ; but her husband being in very humble circumstances, and unable to maintain her, the allowance which had previously been made for maintenance was continued for her.

The husband having no house or place of residence, the payments on this account were actually made to the mother Dorothy Worsdale, but on account of the daughter, and for her maintenance. They amounted in the whole to 196*l.* 13*s.* 4*d.*, and were continued from the time of the marriage in June, 1829, till the end of the year 1833. Mrs. Fowler attained her age of twenty-one years on the 2nd of January, 1832. Although no settlement was made on Mrs. Fowler's marriage, it appeared that after the marriage, Mr. Fooks, the trustee, advanced to Mrs. Fowler the sum of 67*l.* 8*s.* 7*d.*, to provide her with things necessary by way of outfit. These advances to Mrs. Fowler were also objected to.

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Mr. Kindersley and *Mr. B. S. Follett*, for the plaintiffs, contended that the next of kin were entitled to the income arising and which might arise from the property subsequent to the 17th of December, 1829, until the property became distributable: *M'Donald v. Bryce* (1), *Eyre v. Marsden* (2); and they insisted that the defendant Fooks ought to account for the balances which had remained in his hands, with interest at 5 per cent.

They contended also that the payments made by Mr. Fooks, after the marriages of Mrs. Cottle and Mrs. *Fowler, were not authorised by the power and ought not to be allowed, as after their marriages their husbands became legally bound to maintain them. They also argued, that the payments to Mr. Cottle and his children, subsequently to his wife's death ought to be disallowed; and that the power of advancement ceased on her marriage, or, at least, at the time, when under the Thellusson Act, the income was given to the next of kin; they likewise insisted that Fooks ought to bear the costs of the suit rendered necessary by his misconduct, and that the extra costs ought to be paid out of the general estate, according to the decision of the LORD CHANCELLOR in *Eyre v. Marsden* (2).

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Mr. Tinney for the representatives of the widow, and

Mr. Bethell, for the representatives of one of the next of kin, contended that the next of kin were entitled to the dividends of the sum which would have been produced if the money had been properly invested in the funds, and consisted on the 17th of December, 1829, of 19,620*l.* Consols.

(1) 44 B. R. 254 (2 Keen, 276).

(2) 46 B. R. 73 (4 My. & Cr. 231).

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Mr. Pemberton and *Mr. G. Turner*, for *Mrs. Fowler*, contended that the power for maintenance alone was limited to the minority of the objects, and did not cease on the marriage of *Mrs. Fowler*, and that the power of advancement continued after her majority and was not determined by her marriage. * * *

Mr. Cooper for *Mr. Cottle*.

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Mr. Spence and *Mr. G. Russell*, for *Fooks*, contended that the several advances had been properly and *bonâ fide* made, and ought to be allowed to the trustee; that *Fooks* was not responsible to the next of kin, for whom he had not undertaken any trust; that interest on balances was by no means of course, and ought not to be allowed in this case: *Tebbs v. Carpenter* (1); as to costs, they contended that *Fooks* ought not to pay the whole costs of the suit, which was for administering the estate, and for the benefit of all parties.

The MASTER OF THE ROLLS considered the next of kin entitled to the income, subsequent to the time when the accumulations were forbidden by the Thellusson Act; and that there ought to be an inquiry as to the balances from time to time in the hands of *Fooks*, and whether the same were required for the purposes of the trusts contained in the testator's will, with liberty for the Master to state special circumstances, and an inquiry as to what would have been produced from the accumulations if the balances had been properly invested. That *Fooks* was entitled to the general costs of suit as between solicitor and client, he paying so much as had been occasioned by his breach of trust. His Lordship reserved his decision on the other points.

1840.
March 2.

THE MASTER OF THE ROLLS:

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The questions reserved in this case were, first, whether the trustee was justified in paying any sums of money for the maintenance of *Mrs. Cottle* and *Mrs. Fowler*, after they attained the age of twenty-one years; secondly, whether the trustee was justified in paying *any sums of money to *Mr. Cottle* for the maintenance of himself and the children of his deceased wife; and, thirdly, whether *Mrs. Fowler*, notwithstanding her marriage and the attainment of her age of twenty-one years, is entitled to any allowance or payment for her future advancement in life.

The testator, Mr. Webb, died on the 17th of December, 1808: he gave his residuary estate to Mr. Fooks, to be invested and accumulated, and directed that the accumulated fund should be vested in Mr. Fooks for such children as his nephews and niece should leave at their respective deceases, one third part to go to the children of each nephew or niece; and, after providing for the events of all or any of his nephews or niece dying without leaving any child, he empowered the trustee from time to time to apply so much of the income of the estate as, in the judgment of the trustee, might be sufficient and proper for the education and maintenance of the children of the nephews and niece during their minority, and for their future advancement in life.

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(His Lordship having stated the circumstances which had occurred subsequently to the testator's death, proceeded.) At what times the several sums constituting the aggregate amount of 650*l.* were advanced for the maintenance of Mrs. Cottle and her family, does not appear; but Mrs. Cottle was born in October, 1799, and married in January, 1819, so that she was then only nineteen years old, and some of the sums may have been advanced before, and others after, she attained twenty-one years of age.

The allowance of any part is objected to, and I think, that as to such part as was advanced after October, 1820, when she came of age, the objection is good upon *the words of the will; but that, as to the sums advanced during the minority of Mrs. Cottle, although she was married, the same ought to be allowed to the trustee.

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The allowance of 50*l.* a year, for the five years following the death of Mrs. Cottle, by the trustee to her surviving husband, to enable him to support the three children, is also objected to by those who may be entitled to the fund in the events provided by the will; and I am of opinion that the objection is well founded, and consequently that these sums, the payment of which is not authorised by the will, cannot be allowed to the trustee.

As to the allowance for maintenance, made by the trustee to Mrs. Fowler, I have already expressed my opinion that the payments, up to the time when she came of age, ought to be allowed.

On considering the words of the will, it does not appear to me that the subsequent payments ought to be allowed; and I must therefore order the disallowance of so much of the sum of 196*l.* 13*s.* 4*d.* as was paid for or on account of the maintenance of Mrs. Fowler after the 2nd day of January, 1832.

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Although no settlement was made, it appears that after the marriage, Mr. Fooks, the trustee, advanced to Mrs. Fowler the sum of 67*l.* 8*s.* 7*d.* to provide her with things necessary by way of outfit: and I think that that sum may without impropriety be allowed as an advancement.

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Finding myself under the necessity of disallowing these considerable sums to Mr. Fooks on passing his accounts, I think it right to observe that the payments, *though not made according to the authority which he possessed when strictly considered, appear to have all of them been honestly and *bonâ fide* made for the benefit of the objects of the testator's bounty, and at the request of their nearest relation: there is no doubt that he meant fairly and acted as he thought for the best, and did what was, in fact, beneficial to the persons for whom the payments were made; and if this Court could supply the want of authority under the will, this is a case in which it would be done.

But it is claimed for Mrs. Fowler that provision ought now to be made for her future advancement in life. The testator authorised the trustee to apply a sufficient part of the income for the maintenance of the children during their minority, and for their future advancement in life.

It is argued for Mrs. Fowler, that the words "future advancement in life" are not connected with the word "minority," so as to deprive the trustee of his power to apply the income for her future advancement in life, even after she has attained her majority.

On the other hand, it is contended that advancement, as well as maintenance, were intended to be allowed only during minority; that Mrs. Fowler, on her marriage, ceased to be an object of the power; that the question of advancement was left to the discretion of the trustee, who refuses to advance; and that, by the expiration of twenty-one years, there is no subject upon whom the power can operate.

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It does not appear to me that, upon the construction of the will, the power of the trustee to apply part of the income for the future advancement in life of the children, *ceased with the minority of the children, or that, by the expiration of twenty-one years, there has ceased to be any subject for the power to operate upon. The Act which prevents accumulations applies only to that which was meant to be accumulated,—to the residue after the purposes which continue lawful are answered; not to any thing which it

was within the duty or the legal competence of the trustee to do, as against the accumulation if the accumulation had been allowed to proceed : a great difference is indeed effected in the parties who are interested to oppose any application of the income which would otherwise have accumulated, but no difference in the power or duty to apply the income in a mode directed by the will, which continues lawful.

I do not find that in point of fact the trustee refuses to apply any part of the income to the future advancement in life of Mrs. Fowler ; he declines, and necessarily under the circumstances, to act without the sanction of the Court, but that is all ; and I think that Mrs. Fowler is not to be prejudiced by this, if the case be proper for her relief.

The remaining point is, that upon the marriage she ceased to be an object of the power ; and to be sure you cannot advance a woman who is already married by obtaining a marriage for her : she is precluded from any mode of future advancement which is inconsistent or incompatible with the connexion she has formed, and the condition in life in which she has placed herself ; but it does not appear to me that she is therefore precluded from the capacity of receiving the benefit of any application of money for her future advancement in life.

I conceive that there may be various modes in which, notwithstanding her marriage, and without interfering with the condition in which her marriage has placed her, money may be efficiently applied for her advancement in life ; and although no specific mode of application has been suggested, and I think that for that reason I cannot make a reference to the Master on the subject, yet it appears to me that I ought to declare that notwithstanding her marriage, and the attainment of her age of twenty-one years, she is, upon the construction of this will, entitled to have a portion of the income of the accumulated fund applied for her future advancement, and I give her liberty to apply.

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SIDMOUTH v. SIDMOUTH.

(2 Beav. 447—459 ; S. C. 9 L. J. (N. S.) Ch. 282.)

When property is purchased by a parent in the name of his child, it is *prima facie*, an advancement ; the implied trust in favour of the person paying the money, does not in such a case arise. This presumption may, however, be rebutted by evidence, manifesting an intention that the child shall take as trustee.

Where a purchase is made by a parent in the name of a child, the

1840.
April 27, 28.

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cotemporaneous acts and declarations of the parent are evidence to show that the child shall take as trustee only; but the subsequent acts and declarations of the parent are inadmissible for that purpose (1).

Monies were invested in the funds, by a father, in the name of his son, the dividends of which were received by the father during his life, under a power of attorney from the son: Held, after his death, that this was an advancement, and that the funds belonged to the son.

THE question in this case was, whether certain sums which had been purchased in the funds, by Lord Stowell in the name of his only son Mr. Scott, and the dividends of which had, with the concurrence of Mr. Scott, been received by Lord Stowell during his life, belonged under the circumstances to the estate of Mr. Scott, or whether Mr. Scott was a trustee for his father.

At six different times in the years 1825 and 1826, namely, on the 4th of May, the 27th of July, the 29th of October, and the 24th of November, 1825, and on the 27th of January and the 24th of October, 1826, Lord Stowell purchased several large sums in the funds in the name of his only son Mr. Scott, and on the 18th of January and the 24th of October, 1825, and on the 3rd of August, 1826, Mr. Scott executed powers of attorney authorising Lord Stowell and his bankers to receive the dividends, which, [*448] it appeared, had been done, and *the amount carried to the credit of Lord Stowell's account with his bankers.

It did not appear that Mr. Scott knew of the purchases at the time they were made, and in two of the cases it did not appear that he knew of the transfers, until the times when he executed the powers of attorney, but in one case he attended at the Bank with his father and received the dividend warrant, which he handed over to Lord Stowell.

What took place, at the time Lord Stowell directed the purchases to be made, was detailed in the evidence of Mr. Addison, then a clerk of Lord Stowell's bankers, and was as follows: After stating that Lord Stowell was in the habit of coming to his bankers when he had some surplus money to lay out, for the purpose of giving directions as to its investment, and that the witness almost uniformly saw him on those occasions; he stated "that a conversation of this sort usually occurred, viz., after mentioning that he had some spare money to lay out, he would say, partly as if deliberating to himself, and partly as if speaking to witness, 'What shall I buy? I have some idea of buying the stock in my son's name,' and after hesitating and considering for a short time, he would add, 'well, I think I will buy it in my son's name,' or he used expressions to

(1) *Stock v. McArroy* (1872) L. R. 15 Eq. 55, 42 L. J. Ch. 230, 27 L. T. 441.

that effect. That, although the said Lord Stowell now and then evinced some little indecision as to whose name the stock should be purchased in, yet that all the purchases of stock which he made from the 4th of May, 1825, till the month of October, 1826, were with one exception made by his direction in the name of his son William Scott. That the witness was led to believe, as well from his conversations with Lord Stowell, as from the manner in which the stock was dealt with and treated, that Lord Stowell *always considered that the stock, so purchased in his said son's name, still remained his own property."

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In 1830 Lord Stowell made his will and two codicils, and in November, 1831, he made a third codicil, under which he intended Mr. Scott to take considerable benefits. He, however, died in November, 1835, and his father, Lord Stowell, died two months afterwards, in January, 1836.

There was some evidence of his Lordship's solicitor, to the effect that in 1829 and in 1831, at an interview respecting his will, Lord Stowell had spoken of some property which Mr. Scott had in the funds, and which he had taken into account in determining the amount intended to be left to him by Lord Stowell.

There was also some evidence to show that in the enumeration of Lord Stowell's property, shortly before his death, but when his intellects were much impaired by age, the property in question had been included.

The interests of the parties to the suit in the funds in question were as follows: the plaintiff, Lady Sidmouth, would be absolutely entitled to the funds in question, if they formed part of the estate of Mr. Scott; but in the event of the stock forming part of Lord Stowell's estate, the principal defendants would, under the will of Lord Stowell, be entitled thereto, in the event of the death of the plaintiff without issue.

Mr. Pemberton and Mr. L. Wigram, for the plaintiff Lady Sidmouth, contended that the purchase by Lord Stowell in Mr. Scott's name was an advancement to the son, and did not make him a trustee for his father; and that consequently the funds in question formed part of *Mr. Scott's estate, and belonged to the plaintiff as his general legatee.

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[They cited *Finch v. Finch* (1), *Taylor v. Taylor* (2), *Dyer v. Dyer* (3), *Grey v. Grey* (4).]

(1) 10 R. R. 12 (15 Ves. 43).

(3) 2 R. R. 14 (2 Cox, 92).

(2) 1 Atkins, 386.

(4) 19 R. R. 150 (2 Swanst. 594).

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They also contended that the only evidence admissible to prove a trust, must be of facts and declarations cotemporaneous, and that no subsequent acts, or declarations *of a parent were admissible, in evidence, to prove that a trust and not an advancement, was intended; that “nothing *ex post facto* could ever be allowed to alter what had been already done”: *Crabb v. Crabb* (1). * * *

Mr. Hall for Lord Sidmouth and *Mr. Chisholme*, a trustee, submitted to any decision of the Court.

Mr. Kindersley and *Mr. H. Williams*, for the representatives of Lord Eldon, and *Mr. Purvis*, for *Mrs. Forster*, a party in the same interest, contended there was a clear trust of the stock in favour of Lord Stowell; that there was evidence sufficient to rebut the ordinary presumption that *Mr. Scott* was to take beneficially. The execution by him of the powers of attorney—his acquiescence for so many years in the receipt of the dividends by his father, showed plainly that the father and not the son was intended to have the benefit of the investment. That the fact of a father retaining possession had always been looked on as strong evidence against an advancement. In *Woodman v. Morrel* (2) a daughter was decreed to resurrender copyholds on that ground; and in *Murless v. Franklin* (3), it was considered that *possession taken by the father at the time, would amount to evidence to show that the father intended the purchase for his own benefit. * * *

Mr. Turner and *Mr. Alfrey* for *Mr. Sanderson*, in the same interest. * * *

[453] *Mr. Pemberton*, in reply.

April 28. THE MASTER OF THE ROLLS:

The plaintiff in this cause is the legal personal representative of her late brother, *William Scott*, and as such she claims to be entitled to the sum of 5,500*l.* Three per Cents., the sum of 7,000*l.* Three per cent. Reduced Annuities, and the sum of 21,000*l.* Three and a half per cent. Annuities, which were standing in the name of *Mr. Scott* at the time of his death; the defendants are, Lord Sidmouth and *Mr. Chisholme* the executors of Lord Stowell the father of *Mr. Scott* and of the plaintiff, *Elizabeth Forster*, and

(1) 36 R. R. 362 (1 My. & K. 511).

(3) 18 R. R. 3 (1 Swanst. 17).

(2) Freeman, C. C. 32.

Richard Burden Sanderson, who are represented to be two of the next of kin of Lord Stowell (exclusively of his daughter and her issue,) and the executors of the late Lord Eldon, who is represented to have been the only other next of kin of Lord Stowell (exclusively of his daughter and her issue).

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SIDMOUTH.

Mr. Scott died on the 26th of November, 1835, in the life time of his father, Lord Stowell, who died on the 28th of January, 1836. The death of Mr. Scott was not made known to his father, and for some time after Lord Stowell's death, it was supposed that Mr. Scott had died intestate, and on this supposition administration of his estate was granted to his father's executors, and they procured the sums of stock which are in question to be transferred into their names. After the will of Mr. Scott was discovered, administration of his estate was granted to the plaintiff.

By the will of Mr. Scott, the whole of his personal estate was bequeathed to the plaintiff.

By the will of Lord Stowell, his residuary estate is contingently given in trust for the persons who, under *the Statute of Distributions, would be entitled to his personal estate in case he had died intestate and without issue.

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The several sums of stock which were standing in the name of Mr. Scott at the time of his death, were all of them purchased by the directions and with the money of Lord Stowell; and under these circumstances, the plaintiff contends that the stock so purchased by the father in the name of the son, was an advancement to him, and constituted part of his estate, and now belong to her as his legal personal representative; whilst the defendants, the next of kin (exclusively of the plaintiff and her issue) contend that the purchase was made under circumstances which constitute Mr. Scott a trustee for his father, Lord Stowell, and that, notwithstanding the transfer of the stock into the name of Mr. Scott, the beneficial interest therein was vested in Lord Stowell, and formed part of his estate, and upon the happening of the contingency contemplated by him will belong to his next of kin.

The law applicable to cases of this nature is subject to so little doubt that it has not been questioned in the argument of this case. Where property is purchased by a parent in the name of his child, the purchase is *primâ facie* to be deemed an advancement; the resulting or implied trust which arises in favour of the person who pays the purchase money, and takes a conveyance or transfer in the name of a stranger, does not arise in the case of a purchase by

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a parent in the name of a child ; but still the relation of parent and child is only evidence of the intention of the parent to advance the child, and that evidence may be rebutted by other evidence, manifesting an intention that the child shall take as a trustee ; and in this case, as in most others of *the like kind, the only question is, whether there is such other evidence.

That cotemporaneous acts and even cotemporaneous declarations of the parent may amount to such evidence, has often been decided. Subsequent acts and declarations of the parent are not evidence to support the trust, although subsequent acts and declarations of the child may be so ; but generally speaking, we are to look at what was said and done at the time.

In this case, the only evidence showing what was done at the time is that of Mr. Addison, who says that Lord Stowell was in the habit of going to the banking-house of Child & Co. when he had surplus money to lay out, and that on such occasions a conversation of this sort usually occurred, viz., after mentioning that he had some spare money to lay out, he would say, partly as if deliberating to himself, and partly as if speaking to witness, "What shall I buy? I have some idea of buying the stock in my son's name ;" and after hesitating and considering for a short time, he would add, "Well, I think I will buy it in my son's name," or he used expressions to that effect. The witness then proves the stock to have been purchased by the directions of Lord Stowell in his son's name, and leaving it to be supposed that the vague language he has described was employed on the several occasions of those purchases, he says it was understood by the bank that the stock was to be held by the son at the entire and absolute disposal of the father.

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This understanding is not material, as we are to consider what it is of which the facts are evidence ; and I am of opinion that the species of deliberation which was manifested by Lord Stowell, and supposing it to have *occurred on every occasion of transfer, affords no evidence whatever that he intended his son to be a trustee of the stock. I cannot suppose him to have been ignorant of the legal effect of buying the stock in the name of his son ; and it seems much more probable that any hesitation which he evinced was occasioned by a deliberation whether he should or not make an advancement for his son, than by a deliberation whether he should or not make his son a trustee for him at a time when he had other stock standing in his own name, and in which it does

not appear that any convenience could be obtained by making his own son a trustee for him of part of the stock of which he was the owner.

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As far as acts strictly cotemporaneous appear, there does not appear to be any thing to manifest an intention to make the son a trustee for the father. The circumstance that the son was adult does not appear to me to be material. It is said that no establishment was in contemplation, and that no necessity or occasion for advancing the son had occurred, but in the relation between parent and child, it does not appear to me that an observation of this kind can have any weight. The parent may judge for himself when it suits his own convenience, or when it will be best for his son, to secure him any benefit which he voluntarily thinks fit to bestow upon him, and it does not follow that because the reason for doing it is not known, there was no intention to advance at all.

But then it is said that the powers of attorney, which enabled the father or the father's bankers to receive the dividends, though not strictly cotemporaneous, followed so soon upon the transfers as to show that they were part of the same transaction. In none of the cases does it appear that Mr. Scott knew of the transfers at the time *when they were made; in two of the cases it does not appear that he knew of the transfers until the times when he executed the powers of attorney; but in one of the cases he had attended at the bank, and himself received the dividend warrant, and consequently knew of the transfer before he executed the power of attorney; he then permitted his father, who was present, to deal with the dividend as he pleased. These circumstances are not conclusive, but they appear to me to make it probable, that at the time when the transfers were made, Lord Stowell intended that the dividends should be received by himself. Whenever that intention was formed, Mr. Scott acquiesced in it.

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But supposing that the demand of the powers of attorney afford evidence of Lord Stowell's intention at the times of the several transfers, I am of opinion that it cannot thence be deduced that Lord Stowell, at the same times, intended his son to be a mere trustee for him. Consider the situation in which they stood,—the son unmarried, living in the house of his father, and wholly maintained by him, having future expectations from another source, but no present maintenance except from his father, and having very great future expectations from his father's large property; and then consider what the father could mean by transferring sums of

SIDMOUTH stock into the name of his son, with an intention to receive the
 v. dividends himself. It is clear that he meant to continue to main-
 SIDMOUTH. tain his son ; it is probable that if he had meant only a contingent
 provision in the event of the son surviving him, he would have
 made a transfer into the joint names of himself and his son, for
 this would have given the absolute power over the stock to the
 survivor ; if he had intended, notwithstanding the transfer to the
 son, to retain the absolute dominion in himself, it is probable
 [*458] he would have taken care to *extend the power so as to enable
 himself to sell and transfer ; but it is scarcely to be conceived why
 he should make any transfer at all if he intended the son to have
 neither any present interest in the stock, nor any power over it,
 nor any future benefit of any kind from it.

It seems to me to be, if not a necessary, yet an extremely
 probable inference from the circumstances, that the father intended
 to make the son, to the extent of these transfers, secure for the
 future ; but at the same time intended to make the son, for the
 present, dependant upon himself for his support ; that although
 he adopted a mode of proceeding which gave power to the son
 to revoke the letters of attorney and sell the stock, yet he relied,
 and reasonably, upon his own parental influence, upon the habitual
 deference of his son, and upon the conformity to his own will
 which he might expect in a son who had so much to expect from
 him, that no improper advantage would be taken of the power
 which the son obtained by the transfer ; and so, in fact, they went
 on : the son was maintained by the father, who continued to receive
 the dividends.

The evidence of Mr. Chisholme, so far as it shows that at a sub-
 sequent period Lord Stowell referred to this stock as a provision
 to that extent made for Mr. Scott, is material ; it was quite con-
 sistent with its being an advancement that Lord Stowell should
 take it into consideration to determine what further provision
 he should make for Mr. Scott by his will. The other parts of the
 evidence of Mr. Chisholme I do not consider to be important :
 Lord Stowell does not appear at the time to have accurately recol-
 lected the particulars of the stock which he had transferred, and
 Mr. Chisholme may not have succeeded in accurately collecting the
 [*459] very words which Lord Stowell used ; but I do not find any *thing
 in any part of the evidence, which is inconsistent with the material
 part, by which it is shown that Lord Stowell himself considered
 that by the transfers he had made a provision for his son.

The evidence of Mr. Balley, as to conversations between him and Lord Stowell, I consider to be wholly immaterial. With respect to Mr. Scott, Mr. Balley says that he was in want of money, and did not know that he had this stock to resort to, and when told of it, thought he could not use it in his father's lifetime.

On the other hand, it is said, that Mr. Scott could not have wanted money, because he had always a balance in the hands of his bankers. I do not think it important whether he was in want of money or not; under all the circumstances, a balance at his bankers, who were also the bankers of his father, does not appear to prove that he was not. But the conversations with Mr. Balley prove nothing as to the rights of the parties, and if Mr. Balley gave the information about the stock to Mr. Scott in the year 1834, Mr. Scott was concurring in an arrangement recommended by the late Lord Eldon and by Lord Sidmouth, which was much more beneficial to himself.

On the whole, I think there is not, in this case, any thing to rebut the ordinary presumption, which arises from an investment by a father in the name of his son; and I think that the several sums of stock which are in question, form parts of the estate of William Scott, and belong to the plaintiff as his representative.

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v.
SIDMOUTH.

MARIA GUY AND MARY GUY, INFANTS, BY WILLIAM CARNS, THEIR NEXT FRIEND, v. AMELIA GUY AND OTHERS.

(2 Beav. 460—462; S. C. 9 L. J. (N. S.) Ch. 289; 4 Jur. 313, 500.)

Bill filed by two infants; one attained twenty-one before decree; her name as co-plaintiff struck out on her application, with the costs of the application.

Suit improperly instituted on behalf of an infant, dismissed with costs on motion, upon the application of the infant by A. B., a person not then a party to the suit, "as her next friend, for the purpose of the application."

THIS suit was instituted in the name of the infant plaintiffs by their next friend, a person unconnected with their family; on the 6th of March, 1840, Maria Guy attained her age of twenty-one years. It was now moved on her behalf that the above named William Carns might be restrained from taking any further proceedings in this suit in her name, and that her name might be struck out of this suit as a plaintiff, and that William Carns might

1840.
April 23, 30.
—
Rolls Court.
Lord
LANGDALE,
M.R.
[460]

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v.
GUY.

pay the costs of this application ; and also for a reference to the Master, to inquire if it was for the benefit of the infant plaintiff, Mary Guy, that this suit should be prosecuted.

No decree had been made.

It was alleged that the suit had been improperly instituted, and the circumstances being such as to induce the Court to come to that conclusion, it is unnecessary further to state them.

Mr. Pemberton and *Mr. W. C. L. Keene*, in support of the motion. * * *

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Mr. Bethell and *Mr. Puller*, *contrà*, argued that the proper mode of withdrawing from the suit was by giving notice to the next friend and the clerk in Court, and not by a motion ; and that, at all events, the motion could only be granted on terms ; as the suit would otherwise be rendered imperfect. That no reference could be directed as to the other plaintiff, as no application was now made on her behalf. As to dismissing the bill, they observed that it was not asked by the notice of motion.

Mr. Pemberton, in reply.

The MASTER OF THE ROLLS considered that the infant, having attained twenty-one, had a right to withdraw from the suit, and to have the costs of the application.

As to the other part of the case, he said that he could make no order on the present motion, but that he would leave it open to the parties to make such application, on behalf of the infant plaintiff, as they might be advised.

April 30.

A motion was now made “ by the infant plaintiff Mary Guy, by the late plaintiff Maria Guy, her sister, and next friend for the purpose of this application, that the bill might be dismissed with costs to be paid by William Carns, the next friend.”

Mr. Pemberton and *Mr. W. C. L. Keene* in support of the motion, cited *Fox v. Suverkrop* (1), and *Sale v. Sale* (2).

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Mr. Bethell objected that the application ought not to have been made by Maria Guy as next friend, she being now no party to the suit, and such applications having always heretofore been

(1) 49 R. R. 460 (1 Beav. 583).

that the usual reference was dispensed with.—O. A. S.

(2) 1 Beav. 586, a case where the impropriety of the suit was so clear

made through a defendant; and secondly, that there ought to be a reference to the Master to inquire as to the propriety of the suit.

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v.
GUY.

The MASTER OF THE ROLLS, upon the evidence before him, being of opinion that the suit was improper, followed the authorities cited, and granted the motion.

SAINSBURY v. JONES.

(2 Beav. 462—466.)

[SEE a passage from the judgment of the LORD CHANCELLOR on appeal from this decision already reported in 48 R. R. at p. 217 (5 My. & Cr. 1).]

1839.
May 6.
June 1, 3.

Rolls Court.
Lord
LANGDALE,
M.R.
[462]

VINER v. VAUGHAN.

(2 Beav. 466—470; S. C. 4 Jur. 432, 462.)

A tenant for life has no right to open mines or clay pits: but where the author of the settlement has previously worked them, the tenant for life may continue.

Whether a tenant for life can work mines or clay pits, the working of which had been abandoned by the author of the settlement, *quære*.

1840.
April 25.

Rolls Court.
Lord
LANGDALE,
M.R.
[466]

THIS was an application, on the part of persons entitled in remainder, for an injunction, the effect of which was to restrain a tenant for life, and her agents and the defendant Hendy, from digging and carrying away brick earth from the property in question.

The testator had devised his real and personal estate to trustees, their heirs, executors, administrators, and assigns, upon trust to receive, take, and pay the rents, issues and profits, interest and dividends of his real and personal estates respectively, unto his wife Amy or her assigns for and during the term of her natural life, provided she continued a widow; and from and immediately on the decease or marriage of his said wife Amy, whichever might first happen, then upon trust to sell and invest the produce, and pay, assign, transfer, and divide his said trust-monies, and the interest, dividends, and produce thereof, unto and between his daughters, the plaintiff Amy, and Jane, Betsey, Hannah and Clarissa, equally, share and share alike, as tenants in common, when and as they should severally attain the age of twenty-one years; and in the mean time to apply the dividends towards their maintenance and education.

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VINER
v.
VAUGHAN.

After the testator's death in 1823, the widow entered into possession of the property, part of which contained brick earth. She had recently entered into an agreement with the defendant Hendy to permit him to excavate and work the brick earth for the purpose of making bricks, and Hendy had commenced working the clay pits and removing the soil.

The plaintiff, Amy Viner, filed this bill for an account of the soil taken and of the amount of injury suffered, for payment thereof, and for an injunction.

A motion was now made for an injunction; affidavits were made in support and in opposition to the motion, which were rather contradictory. It appeared, however, that the former owner, from whom the testator purchased the property, had worked the clay-pits; that *the testator had purchased the property a few years before his death, and had filled up part of the excavations made by the former owner, but that immediately before his death he had made some preparations for brickmaking on the premises.

Mr. Pemberton and *Mr. Austen*, for the motion, contended that the widow, a tenant for life impeachable for waste, had no right to dispose of the very soil of the property, and injure the surface in the manner in which she was proceeding to do; and secondly, that a tenant for life had no right to work mines or clay-pits, the working of which had been abandoned by the settlor, or which had only been used for purposes of temporary convenience by a former owner.

Mr. Stuart and *Mr. Lewis*, *contra*, contended that it was not competent for a party entitled in remainder to an undivided share in the purchase money of an estate vested in trustees for sale, to file a bill of this description, and that the trustees alone had a right to interfere.

That where mines or clay-pits (the law regarding which was the same) were open at the time of the settlement, the tenant for life had a right to work and have the benefit of them as part of the profits of the land: *Saunders's case* (1), *Clavering v. Clavering* (2), *The Countess of Plymouth v. Lady Archer* (3), and *Co. Litt.* 53 b were cited.

Mr. Pemberton, in reply, insisted that there was a distinction between working minerals and brick earth; in the former case the

(1) 5 Coke's Rep. 12 a.

(3) 1 Br. C. C. 159.

(2) 2 P. Wms. 388.

unprofitable substratum was *taken away, but in the latter the soil or the estate itself was removed; that where the working of mines, &c. had been discontinued, they could not be subsequently worked by the tenant for life. That there was no proof of any working at all by the last owner, and only a temporary one by the previous possessor of the property.

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v.
VAUGHAN.
[*469]

THE MASTER OF THE ROLLS :

In this case the defendant Mrs. Vaughan is tenant for life of the property in question under the will of her husband. It is said she is equitable tenant for life, the legal estate being vested in trustees. After her death or marriage the estate is to be sold, and the money to arise from the sale is to be divided amongst her children, of whom the plaintiff is one; the plaintiff is therefore entitled to one fifth of the money to arise from the sale of the estate after the death of the tenant for life. The defendant, the widow, has authorised the other defendant James Hendy to take away the substance of the land, and the plaintiff naturally complains that it is to her prejudice, and to prevent it she asks for an injunction. I have no doubt that she has a right to demand this protection, without relying on the trustee to ask it; according to the principles of justice, she has a right to ask to have an injury to her rights prevented. The words of the will do not entitle the widow to proceed in the mode she is doing: she is tenant for life simply, and is therefore impeachable for waste. On the general law there is no controversy: a tenant for life has no right to take the substance of the estate, by opening mines or clay-pits: but he has a right to continue the working of mines and clay-pits where the author of the gift has previously done it; and for this reason, that the author of the gift has made them part of the profits of the land; but it does not follow that the tenant for life has a right to open old abandoned pits and mines, or to commence *opening any mines or pits which the author of the gift has merely made preparations for opening. This, however, is the question in this case; it appears there were old pits which had not been worked for twenty years; it is stated that the last owner, for some purpose or other, had taken some clay out of them, and had made some preparations for working them, yet it is not stated in the affidavits, that these pits were in the course of working at the time of the testator's death; this, therefore, was not an open mine in the course of working at the death of the testator: and the only question now before me

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v.
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is, whether a tenant for life is to be allowed to take away the substance of the estate before this question has in some way or other been tried; I think there is so much doubt, whether they were in such a state as to entitle the tenant for life to work them, that the defendants ought not to be allowed to proceed until that question has been tried. An injunction must therefore be granted.

Affirmed by the LORD CHANCELLOR, 9th June, 1840.

1840.
April 16.

WILKINSON v. CHARLESWORTH (1).

(2 Beav. 470—471.)

Rolls Court.

Lord
LANGDALE,
M.R.

[470]

A. B., on whose estate the plaintiff had a charge for principal and interest, being desirous of paying it instead of having it raised out of the estate, was ordered to pay it into Court by a given day. He made default, and applied for an extension of the time, which was granted: Held, that the plaintiff was not entitled to subsequent interest on the aggregate of principal and interest due, but on the principal only.

[*471]

THE plaintiff was entitled to a charge of 12,000*l.* on an estate which belonged to ten different persons, who, instead of having the sum raised out of the estate under the decree, were desirous of paying it off; an *order was in consequence made, by which each of the parties was ordered to pay into Court one tenth of the amount of principal and interest due. The several parties obeyed the order except A. B., who allowed the time to expire without paying in his share of the money due, which amounted to 1,700*l.*, of which 1,200*l.* was principal money.

Mr. Ellison, on his behalf, now moved to extend the time for paying the money into Court.

Mr. Tinney and *Mr. Pemberton*, *contrà*, contended that this indulgence ought not to be given except on the terms of the applicant paying interest on the whole 1,700*l.*, together with all the costs incurred by his disobedience of the order.

Mr. Ellison, in reply, contended, that subsequent interest ought only to be paid on the principal sum of 1,200*l.*

THE MASTER OF THE ROLLS :

It is almost of course to give leave to pay in the money; but the

(1) *Elton v. Curteis* (1881) 19 Ch. D. 49, 51 L. J. Ch. 60, 45 L. T. 435.

question is, on what terms. It certainly is not strict justice, that the plaintiff, who has been kept out of his money, should not have interest on the whole amount; but I do not think that I can make an order charging Mr. B. with compound interest; he must, however, pay the costs which have been occasioned by his neglect to comply with the previous order.

WILKINSON
v.
CHARLES-
WORTH.

WILLIAMS v. NIXON (1).

(2 Beav. 472—477; S. C. 9 L. J. (N. S.) Ch. 269.)

1840.

May 5.

Rolls Court.

Lord
LANGDALE,
M.R.

[472]

Two executors were directed, after making some annual payments, to invest and accumulate the surplus. One of the executors received the dividends of stock for several years, and misapplied them; it did not appear that the other executor had any knowledge thereof: Held, that the latter was not answerable for the breach of trust.

Two executors sold out stock, and the produce was received by one: Held, that the other was responsible for its misapplication, but was entitled to an enquiry, whether any part had been applied in discharge of claims against the testator.

The official assignee of a defaulting trustee whose assets had been distributed held not entitled to costs.

THE testator by his will gave his residuary estate to the defendants Nixon and Mills, in trust, to pay an annuity of 200*l.* a year to his widow, annuities of 10*l.* each to his three sisters, and an annuity of 500*l.* a year to his son until he attained forty-five; they were to invest and accumulate the remainder until the son attained forty-five, and then to pay him the income for life, with remainder in trust for the son's children. The will contained an indemnity clause, that the trustees and executors should not be answerable for one another, or for the defaults of the other, and should be accountable only for the monies which should actually come to their hands respectively.

The testator died in 1825, and both his executors proved his will; his property principally consisted of money in the funds, which produced an income of nearly 1,200*l.* a year. Nixon left the management of the testator's affairs entirely to Mills, who received the dividends, paid the annuities, &c.; but neglected to invest the surplus; in 1834 Mills became bankrupt, and was found a debtor to the estate in the sum of about 6,099*l.*

It appeared, that in 1826 Nixon concurred with Mills in the sale of a sum of 450*l.* 8 per cents., the produce of which was retained by Mills. As to this Nixon said that the testator held a farm on

(1) See *post*, p. 355, and cases there cited.

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v.
NIXON.
[*473]

lease, which it became desirable to give up, and that the stock in question had *been sold and applied in discharge of the claims of the landlord in surrendering the lease.

The testator's son died in 1831, under forty-five, leaving the plaintiffs, his infant children.

The bill was filed in 1833.

The debt of 6,099*l.* had been proved under Mills's commission, and 609*l.* had been paid in respect thereof; his assignees were made parties by supplemental bill.

The cause now came on for further directions on the Master's report.

Mr. Pemberton and *Mr. F. Bayley* for the plaintiffs, the residuary legatees, contended that the defendant *Nixon* was liable for the 450*l.*, he having joined in selling it out of the funds. That by proving the will he had accepted the trusts: *Mucklow v. Fuller* (1); and became bound to see to their due performance by his co-trustee. That he had notice of the trusts of the will, and of the situation and value of the testator's estate: that he must have known that there was a large surplus of income, which ought to have been half-yearly invested by Mills, and that it was his duty to have seen it done. That having stood by, and allowed his co-trustee to commit a breach of trust, he became, by his neglect to interfere, personally responsible: *Booth v. Booth* (2); and that the trustee indemnity clause did not relieve him from this liability: *Mucklow v. Fuller* (1).

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Mr. Kindersley and *Mr. Puller*, *contrà*, for *Mr. Nixon*, contended that he was justified in joining in selling out the *450*l.* which was wanted for the purpose of administering the estate of the testator, and also in allowing his co-executor to receive it for that purpose. That even if he was liable in the first instance for this sum, still he was entitled to discharge himself by showing that it had been applied in payment of valid claims upon the testator's estate: *Shipbrook v. Hinchinbrook* (3), *Underwood v. Sterens* (4). That it had neither been charged nor proved that *Nixon* had any knowledge of the misapplication of the funds by his co-executor, and that he could only have ascertained and prevented it by taking expensive legal proceedings, which he was not justified in doing. That his co-executor had done no more than the law allowed,

(1) 23 R. R. 29 (Jacob, 198).

(2) 49 R. R. 304 (1 Beav. 125).

(3) 8 R. R. 138 (11 Ves. 252).

(4) 1 Mer. 712.

which permitted one of several executors to receive dividends, and deal with the testator's estate, without the concurrence of his co-executor, and in this respect, the case differed from that of joint trustees. That he had proved the will on the faith of the indemnity clause in the testator's will, which declared he should not be answerable for the defaults of his co-executor, and in the face of that declaration, the Court ought not now to visit him with the defaults of Mills.

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Mr. Bethell for the assignees of Mills.

Mr. W. H. Clarke for another defendant.

Mr. Pemberton, in reply :

By proving the will, Nixon had notice of the trusts for accumulation, and on taking out probate, he must have sworn to the amount of the property, and must, therefore, have been cognisant of the particulars. He knew the charges created by the will, and that there was a *large surplus to be invested ; yet he does not appear to have made any inquiry as to the investment ; if he had, he must have become aware of the breach of trust, and must have sanctioned it.

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THE MASTER OF THE ROLLS :

The question in this case is, whether the defendant Mr. Nixon is to be charged with the monies which were received by his co-executor Mr. Mills. With regard to a portion, namely, the produce arising from the sale of the stock, in which Mr. Nixon concurred, he clearly is liable.

There can be no doubt, that if an executor knows that the monies received by his co-executor are not applied according to the trusts of the will, and stands by and acquiesces in it, without doing any thing on his part to procure the due execution of the trusts, he will, in respect of that negligence, be himself charged with the loss ; but in cases of this kind it is always to be observed that the testator himself, having invested certain persons with the character of executors, has trusted them to the extent to which the law allows them to act as executors ; and in that character each has a separate right of receiving and of giving discharges for the property of the testator. In this particular case the testator having

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money in the funds and other property to a considerable amount, directed certain annuities to be paid, and bequeathed his residuary estate in the mode stated. Both executors proved the will, and thereupon each of them became entitled to receive the property. One of them did receive the property—the dividends upon the stocks, and funds, and the other personal estate. If Mr. Nixon knew that his co-executor was misapplying the monies thus received, and acquiesced in it, he *became himself liable; because he was a witness and an acquiescing party to the misapplication or breach of trust; but if he was not aware of the misapplication, I know of no case in which the Court has gone the length of saying, that an executor shall be held personally answerable for standing by and permitting his co-executor to do that, which, for any thing he knows to the contrary, was a performance of the trusts of the will. In this case it is clear Mr. Nixon must have known there was stock in the funds. He might have known that the dividends arising from that stock were from time to time received by Mr. Mills; knowing that, he might nevertheless have full reason to believe that they were duly applied, according to the trusts and directions of the will, in satisfaction of the annuities, or of the rent of the leasehold estate possessed by the testator at his death, and which was payable out of the whole estate. The argument for the plaintiffs proceeds upon this, that you are to impute to Mr. Nixon a knowledge of all that he might have known. It is said he proved the will, and must, therefore, have known its contents, and what was to be done in pursuance of the trusts; this is a presumption which I think the law itself will draw, and he must therefore be taken to have known the contents of the will; then it is argued, that on proving the will, he was bound to make a statement upon oath respecting the value of the property, and therefore became acquainted with the particulars. He might have had some knowledge of it to the limited extent which can be known on such occasions; but I cannot impute to him a knowledge of the exact state or amount of the property or of the claims upon it, or the clear amount of the balance in the hands of his co-executor. I certainly do not recollect any case, in which the principle has been carried to the extent to which it has been here pressed; and if in this case I were to charge Mr. Nixon *generally with all the assets received by his co-executor, I must in every other case say, that an executor who does not personally act, and who having no reason to suspect any misapplication by his co-executor, permits him to

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act alone, is liable for every misapplication committed by his co-executor: I do not think I can lay down any such rule.

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c.
NIXON.

With respect to the 450*l.*, he is clearly liable; whether he is discharged from it may be a question. It will be for him to show that this money was applied towards the payment of debts owing from the testator's estate; and upon doing that, then, according to the cases which have been cited of *Lord Shipbrook v. Lord Hinchinbrook* and *Underwood v. Stevens*, he will be discharged in respect of this sum. I do not think that this satisfactorily appears, because the Master has not reported it, but if it is desired, I will grant an inquiry.

Mr. Bethell asked for the costs, out of the fund, of the assignees, or, at least, of the official assignee, who was a formal party, having no interest. The bankrupt's estate had been exhausted.

Mr. Pemberton, contra :

The official assignee does not appear separately from the creditor's assignee.

THE MASTER OF THE ROLLS :

If Mills had been solvent he would have had all the costs to pay. The assignees might have made a reservation of funds out of the bankrupt's assets to meet the costs. I think they cannot have their costs.

EYRE v. HANSON.

(2 Beav. 478—480; S. C. 9 L. J. (N. S.) Ch. 302.)

In a foreclosure suit, an order to enlarge the time for payment of the mortgage money, is by no means of course, but may be refused, where no excuse for the default is stated, and the security does not appear to be ample.

The usual condition on which it is granted is, on payment of interest and costs before the time appointed by the Master for payment of the whole; in this case, however, it was ordered, that upon payment of the interest and costs within a month, the time should be enlarged for five months.

THE plaintiff, the mortgagee of some property belonging to the defendant, filed his bill of foreclosure in June, 1837; the ordinary decree was made in June, 1839, and the accounts, &c. were referred to the Master. On the 4th of December, 1839, the Master reported, that on the 4th of June, 1840, the sum of 11,921*l.* would be due to

1840.
May 27, 28.
Rolls Court.
Lord
LANGDALE,
M.R.
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the plaintiff, and he appointed that time for payment; and in default, that the defendant should be foreclosed.

It was now moved for the defendant, that it might be referred back to the Master to compute subsequent interest and costs, and that the defendant might have six months further time to pay what might be reported due. The application was supported by an affidavit, stating that the defendant had used his best endeavours to find a person who would take an assignment of the mortgage, and to sell the estate, but without success. That the summer was the best time to sell the property; that the estate had cost nearly 22,000*l.*, and that the defendant had laid out 4,000*l.* in improving it; and that it was of the utmost importance for the defendant and his family, that some further time should be allowed to him for payment, so as to enable him in the mean time to take advantage of the summer season for the disposal of his said estate.

On behalf of the plaintiff it was represented, that the estate was not of much greater value than between 13,500*l.* and 14,500*l.*, and it was proved that no interest had been paid since September, 1836.

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Mr. Treslove and Mr. Harwood, in support of the motion. * * *

Mr. Pemberton and Mr. M'Donnell, *contra*.

May 28. THE MASTER OF THE ROLLS :

The order to enlarge the time for payment of what the Master has found due on a mortgage is by no means of course: in *Nanny v. Edwards* (1), the application was refused, as it may be in any case where no excuse for the default is stated and the security does not appear to be ample.

When the indulgence is granted, it has frequently been for six months on the first application; but this must depend on the circumstances, according to which a time greater or less may be granted.

The condition on which the order is usually granted is payment of the interest and costs reported due, on or before the time appointed by the Master for the payment of the whole; as was the case on the first order for enlargement which was made in *Edwards v. Cunliffe* (2). In that case the Master's report was made on the 23rd of June, 1814, the time appointed for payment was the 23rd of December, 1814, being six calendar months from

(1) 28 R. R. 24 (4 Russ. 124).

(2) 1 Madd. 287.

the date of the report. On the 10th of the same month, being only thirteen days before the expiration of the time, an application was made to enlarge it, and an enlargement for six months was made, on payment of the interest and costs on or before the 23rd of December, 1814; *that is, on or about the expiration of the time limited by the Master for the payment of the whole. If this order were followed as a precedent, the order to be now made would be to enlarge the time on payment of the interest and costs on or before the 4th of June next, an order which it might be difficult for the defendant to avail himself of.

But there are cases where a different form of order has been adopted; and under the circumstances of the present case, I think it will be proper to order, that on the defendant paying to the plaintiff the sum of 1,921*l.* 15*s.* 4*d.*, the amount of interest and costs reported due to the plaintiff, within a month, the time for redemption may be enlarged for five months. To this must be added the clause which was added in the case of *Edwards v. Cunliffe*, that in default of the defendant's paying to the plaintiff the sum of 1,921*l.* 15*s.* 4*d.* by the time aforesaid, the defendant is to stand absolutely foreclosed.

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v.
HANSON.

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LICHFIELD v. BAKER.

(2 Beav. 481—488; S. C. 9 L. J. (N. S.) Ch. 291.)

[SEE the report of this case on appeal in 13 Beav. 447, to be contained in a later volume of the Revised Reports.]

1840.
May 8, 9.

Rolls Court.
Lord
LANGDALE,
M.R.

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DAY v. CROFT.

(2 Beav. 488—493; S. C. 9 L. J. (N. S.) Ch. 287; 4 Jur. 429.)

The allowance to a receiver appointed by the Court depends on the degree of difficulty or facility experienced in the collection. There is no general rule as to the amount.

[In this case upon the point mentioned in the head-note,

1840.
April 1.
May 12, 14.

Rolls Court.
Lord
LANGDALE,
M.R.

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THE MASTER OF THE ROLLS said:]

Various representations having been made at the Bar, as to the principle and the practice adopted in the offices of the different Masters in respect of receiver's allowances, I thought it right, before disposing of the case, to enquire of the Masters what were

May 14.

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v.
CROFT.

[*492]

the principles upon which they acted, and the practice adopted on this point in their several offices. The Masters have each of them been good enough to furnish me with a certificate: and I find that there is no general rule, which universally prevails as to the allowance to a receiver. Where the receipts consist of rents of freehold and leasehold estates, 5*l.* per cent. upon the amount received is most frequently allowed (1). If there be any special difficulty in collecting the rents, on account of the sums being extremely small, or of the payments being very frequent, as weekly payments, then the allowance is increased; on the other hand, if there should be very great facility in receiving the rents, then less than 5*l.* per cent. is allowed. One of the Masters has certified *to me a case, where, after consideration, he allowed only 4*l.* per cent. for the receipts of rents and profits of freehold and leasehold estates. Another Master has certified to me a case, in which the sum paid to the receiver amounted to 300*l.* a year for the first year; the receiver was afterwards allowed 150*l.* only for a succession of years, which was afterwards reduced to 50*l.* a year, for the receipt of the same rents; it cannot therefore be considered as an universal or general rule, that 5*l.* per cent. should be allowed even upon the receipts of rents and profits. It may be increased if there be any extraordinary difficulty, or diminished if there be any extraordinary facility in the collection.

With respect to other receipts, each Master considers himself bound to have regard to the degree of facility or difficulty there may be in receiving them. They have sometimes allowed 2½ per cent., but for gross sums of money this has been very much reduced, and 1½ per cent. has been allowed upon many occasions. It appears, therefore, that the Masters, as they ought, consider upon each occasion, what is fit or proper to be allowed, having regard to the degree of difficulty or facility experienced by the receiver.

The Master, whose report is sought to be reviewed, informed me, at the time this matter was before him, an objection was made to the amount of the allowance which he had awarded, but that the particular circumstances, and the particular nature of the items, were not brought to his attention: the consequence of which was, that having nothing to induce him to depart from the common rule of 5*l.* per cent., he allowed it.

(1) The amount usually allowed a different rate appropriate is now where no special circumstances make 3 per cent.—O. A. S.

Under all these circumstances, there being about 1,000*l.* allowed to the receiver, for receiving these sums *of money consisting of large sums paid for mortgages, for redemption of annuities, for interest upon mortgages, and for annuities : and the Master not having had the opportunity of considering what ought to be allowed in this particular case : I think there is no doubt that I ought to refer it back to him, to review his report. The petition, therefore, in this respect succeeds. There are very many parties in this cause, who appeared (I cannot say improperly) to defend the Master's report ; they must have their costs of the application.

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v.
CROFT.
[*493]

STUBBS *v.* SARGON (1).

(2 Beav. 496 ; S. C. 3 Jur. 1118.)

The Court declined taking the consent of a married woman, who was a minor, to the payment out of Court to her husband of money to which she was entitled.

1839.
Nov. 23.
Rolls Court.
Lord
LANGDALE,
M.R.
[496]

A MARRIED lady who had not attained twenty-one, being entitled to a sum of money in Court, petitioned to have the same paid out to her husband, and she attended in Court for the purpose of being separately examined and consenting thereto.

Mr. Walker, in support of the petition, relied on *Gullin v. Gullin* (2), where a similar order had been made ; but

The MASTER OF THE ROLLS said he felt great difficulty in acting upon that authority, and declined making the order.

MORRICE *v.* SWABY.

(2 Beav. 500—501.)

A defendant by his answer stated, that he had handed over some documents relating to the matters in question to his agent in Jamaica, to enable him to defend a suit there. That the agent had left the island, and that the documents had been taken possession of by a receiver appointed by the Court of Chancery there :

Held, that this admission entitled the plaintiff to an order for production ; but liberty was given to the defendant to relieve himself, if possible, by affidavit, from the effects of this admission.

1840.
May 13, 14.
Rolls Court.
Lord
LANGDALE,
M.R.
[500]

THIS was a suit instituted in respect of a property in Jamaica.

The defendant, the executor, in his answer, after stating the

(1) *Shipway v. Ball* (1881) 16 Ch. D. (2) 7 Sim. 236.
374, 50 L. J. Ch. 263, 44 L. T. 49.

MORRICE
v.
SWABY.

institution of a suit in that colony in respect of the same matter, said, "that in order to enable his agent in the said island to render on defendant's behalf all such accounts as defendant was liable to render in respect of the testator's real and personal estate, he, defendant, sent to his said agent sundry books, accounts," &c. relating to the estate, "which were in defendant's possession." "That his said agent some time since left the said island without having returned to defendant the said books, accounts, &c., and that, therefore, the said particulars were taken possession of by a person who had been appointed receiver of the testator's real and personal estate, or some part thereof, by an order of the said Court of Chancery in Jamaica, made in the hereinbefore mentioned suit, and the defendant believed that the said several particulars were now in the said island of Jamaica."

He subsequently stated that he kept no list of the documents so sent to Jamaica, and that, save as appeared by the third schedule, he had not now, nor had he ever, in his possession, custody, or power, any document, &c., relating to the testator's estate, and that he had in the third schedule set forth the best list he was able of all such particulars, by the bill inquired after, as were then, or ever had been, in his possession, custody, or power.

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The third schedule was as follows: "An account book; an account current book; a journal and sundry accounts and vouchers which have been transmitted from time to time by this defendant to Jamaica; a bundle of vouchers, numbered 1 to 25 inclusive; sundry accounts and documents, numbered 26 to 32."

Mr. Pemberton and *Mr. Bagshawe* moved for the production of all the documents in the third schedule.

Mr. Kindersley and *Mr. Bazalgette* contended that no order for the production of the documents in Jamaica ought to be made, as there was no sufficient admission of their possession: *Farquharson v. Balfour* (1) was cited.

May 14.

THE MASTER OF THE ROLLS:

In *Farquharson v. Balfour*, which was cited, the defendant stated he had not papers in his power for a reason which showed that they were. Here the effect of the answer is this, the defendant had the papers in his possession or power, and delivered them to his

agent, and they were taken out of the possession of the agent by another person whom the defendant calls the receiver. They are now in the hands of the same person, and from the latter part of the answer connected with the former, I must presume that they are now in the possession or power of the defendant. I think, however, from what is stated, that the defendant ought to have leave to remove the effect of this admission by affidavit. I must make the order for the production of these documents, unless the defendant satisfactorily shows by affidavit that the documents in question are so circumstanced as not to be in his possession, custody, or power.

MORRICE
v.
SWABY.

ATTORNEY-GENERAL v. THE DRAPERS' COMPANY.

(2 Beav. 508—511.)

1840.
June 15, 18.

Rolls Court.
Lord
LANGDALE,
M.R.
[508]

In every case where the general purpose of a gift or conveyance is declared to be charity, and the particular payments do not exhaust the whole fund, any surplus will belong to the charity, unless there are other circumstances from which a contrary intention of the testator can be collected.

THE facts of this case are fully stated in the judgment of the MASTER OF THE ROLLS. It was argued by

Mr. Pemberton and *Mr. Blunt*, for the information.

Mr. Kindersley and *Mr. Lloyd*, *Mr. Kyle*, and *Mr. Foster*, for the defendants.

THE MASTER OF THE ROLLS :

This is an information filed by the *Attorney-General* against the *Drapers' Company*, for the purpose of having it declared that the whole income of the property possessed by the Company, under the will of Samuel Harwar, is applicable to the charitable purposes in the will declared.

Having read the pleadings and the evidence, and attended to the argument addressed to me on behalf of the defendants, I am of opinion that the question depends upon the true construction and meaning of the testator's will, and that this construction cannot be affected by a letter which is said to have been addressed to the Company by the testator some time before the date of his will, or by that which, under the circumstances of this case has, as it appears to me, been incorrectly called cotemporaneous

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A.-G.
v.
THE
DRAPERS'
COMPANY.

usage. The Company appears to have been unwilling to accept the trust so long as it was conceived to be likely to be burdensome, and to have accepted it only when it was thought likely that it might be accepted without loss.

The testator, by his will, dated the 28th of January, 1703, bequeathed to his executors 1,700*l.*, in trust to lay out, with the advice of the overseers after named, 100*l.*, more or less, in the purchase of a piece of ground, &c., for erecting twelve almshouses, &c., and he directed that in building the same his executors should expend 400*l.*, or thereabouts, and should convey the same to the Company of Drapers for the habitation of three poor men and three poor women of the Drapers' Company, and three poor men and three poor women of the parish where the almshouses should be situate, &c.; and he directed that the remainder of the 1,700*l.* should be laid out in the purchase of an estate of inheritance of 60*l.* a year or thereabouts, &c., to be conveyed to the Drapers' Company, &c., for the maintenance and support of the six poor men and six poor women in the said almshouses for ever, in manner following; that is to say, in trust that the Court of Assistants of the said Company for the time being, by and out of the rents and profits of the said estate to be purchased, should from time to time monthly, by themselves or agents, pay and distribute to the said six poor men and six *poor women, or such number of them as should be in the said almshouses, 6*s.* a-piece (1), and once every year to each of them a load of good coals; and upon a yearly visitation to each of them 1*s.* a-piece.

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The question raised upon the construction of this will arises from this, that the testator, having stated that the conveyance was to be made to the Drapers' Company for the maintenance and support of the almspeople in the almshouses, refers to the manner of such maintenance and support, and then expresses a trust for payments which do not, as it is said, exhaust the whole income which he contemplated; and upon this the defendants contend that they are only bound to make the specific payments mentioned in the will, and having done so, are entitled to apply the surplus revenue to their own use.

That this cannot be so, as to the whole extent of the claim, appears to be clear, for by the will itself, no specific payment is directed to be made for the repairs of the almshouses, and yet, as

(1) This would amount to 43*l.* 4*s.* a year only, while the present income of the charity property was 145*l.*

the testator intended the almspeople to be maintained in the almshouses, he must have meant the almshouses to be kept in repair out of the income of the purchased lands, and consequently, must have meant to charge the Company with more than the specific payments. The agreement afterwards entered into by the Company with the parish of St. Leonard's, Shoreditch, by which the latter agreed to keep the almshouses in repair, could not have been in the contemplation of the testator, and the will must be considered as if the burden of the repairing had remained with the Company. But besides this, it appears to me, from the words of the will, that as the maintenance and support of the almspeople in *the almshouses is the expressed purpose for which the conveyance is directed to be made to the Company, the mere circumstance that in describing the manner of maintenance and support, he has not (if the fact were so) exhausted the whole income, is not a sufficient reason for considering that any surplus was meant for the pecuniary benefit of the Company. In the case of the *Skinners' Company* (1), though the gift was for the maintenance and continuance of the school, after appropriating or directing the payment of various fixed sums for specific purposes, the overplus was willed to the use of the Company. In *Jordeyn's Charity* (2) whatever was left unspent was given for repairs, and for the profitable use of the Fishmongers' Company; and, in the case of *Brazenose College* (3), there were many circumstances from which the intention of the testator to benefit the college was deduced; and I apprehend that in every case where the general purpose of a gift or conveyance is declared to be a charity, and the particular payments do not exhaust the whole fund, any surplus will belong to the charity, unless there are other circumstances from which a contrary intention of the testator can be collected.

In this case there do not appear to me to be any such circumstances; the general purpose of the conveyance to the Company is charity. It does not appear, that at the time of the testator's death, there was or could be an income which would have left any surplus, but whether this were so or not, I think, when the general purpose is thus declared, the reference to the mode of effecting the purpose, which does not exhaust the whole income, is not of itself sufficient to exonerate the trustee from applying the surplus, if any, to the general purpose.

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v.
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COMPANY.

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(1) 26 R. R. 126 (2 Russ. 407).

(3) 37 R. R. 107 (2 Cl. & Fin. 295).

(2) 1 My. & K. 416.

1840.
June 8.

GOODENOUGH *v.* TREMAMONDO (1).

(2 Beav. 512—514.)

• *Rolls Court.*

Lord
LANGDALE,
M.R.

[512]

A testator gave the residue of his estate and effects to trustees, to permit the rents, interest, and annual proceeds to be received by A. for life, and after his decease to C. and D. when they attained twenty-one, with power after the death of A. to apply the rents, &c. towards the maintenance of C. and D. until their shares should become vested. Part of the residue consisted of leaseholds: Held, that the tenant for life was entitled to enjoy them in specie, and that they were not to be converted for the benefit of those in remainder.

FREDERICK ANDREE, by his will, dated the 30th of January, 1822, after bequeathing some pecuniary and specific legacies, proceeded as follows: "And as to all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, I give, devise, and bequeath the same unto Anthony Angelo and Charles John Lawson, their executors, administrators, and assigns, in trust to permit the rents, issues, profits, interest, and annual proceeds thereof to be received and taken by my said son, Richard Collier Andree, for and during the term of his natural life, for his own use and benefit; and from and after his decease, upon trust for Ann and Sophia, the two daughters of my said son Richard Collier Andree, when they shall attain the age of twenty-one years, equally to be divided between them, share and share alike. And I empower my said trustees and executors, after the death of my said son Richard Collier Andree, to apply the rents, interest, profits, and annual proceeds of my said residuary estate and effects, for and towards the maintenance and education of the said Ann and Sophia Andree, until their respective shares shall become vested." And he appointed the said Anthony Angelo and Charles John Lawson executors of his will. The will was not executed so as to pass real estate.

The testator died shortly afterwards. Part of his property consisted of a leasehold house in Oxford Street.

[*513] The bill was filed by an infant, who was entitled to the share of his mother Sophia Andree, afterwards *Sophia Goodenough, deceased; and prayed for the usual accounts,—that the residue might be ascertained,—and that it might be declared, that the leasehold premises ought to have been sold immediately after the said testator's decease, and the clear produce thereof invested in Consols, and that the dividends of such Bank Annuities only, ought to have

been paid to the tenant for life, and for consequential relief both against the trustees, and the tenant for life.

By the decree made in this cause on the 30th of May, 1837, it was referred to the Master to make the usual enquiries, and take the usual accounts, and he found that part of the residue consisted of the leasehold house.

The cause now came on to be heard for further directions; the only question was, whether the leasehold house, the term in which had now only a few years to run, ought or ought not to have been sold at the testator's death.

Mr. Kindersley and *Mr. Girdlestone*, for the plaintiffs, contended that a sale ought to have taken place. That the general rule (1) was in favour of conversion, and there were no special circumstances here to take the case out of the rule. That this was indeed a strong instance of the propriety of the doctrine; for if no conversion took place, there would be but little chance to those in remainder of receiving any benefit from the leasehold property. That the only circumstance apparently in favour of the defendants was the use of the word "rents," which seemed to indicate an intention that the residue should be enjoyed in specie; but that this word, coupled as it was with other words denoting annual income, could not be much relied on; that the word "estate" would have comprised freeholds, if the will had been executed so as *to pass real estate, and the word "rents" might therefore be referred to the testator's idea that he was disposing of real as well as personal property. They distinguished this case from that of *Pickering v. Pickering* (2) in this, that here the same residue was given to those in remainder as to the tenant for life, whereas, in *Pickering v. Pickering*, the LORD CHANCELLOR mainly founded his decision on the fact of a different residue being given to the widow during her life from that which was afterwards bequeathed to the son.

GOOD-
ENOUGH
r.
TREMA-
MONDO.

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Mr. Pemberton and *Mr. Prescott White* appeared for the defendants Tremamondo and Castell and his wife, and *Mr. Loftus Wigram* for Thomas William Flavell; but

The MASTER OF THE ROLLS, without calling on them, said, that

(1) *Howe v. Lord Dartmouth*, 6 R. R. (2) 48 R. R. 104 (4 My. & Cr. 289).
96 (7 Ves. 137).

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Mr. Kindersley and *Mr. Younge*, for the plaintiffs, contended that these were general legacies, and that their value ought to be raised out of the general personal estate. * * *

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Mr. Pemberton, *Mr. Sergeant Talfourd*, and *Mr. Bacon* for the principal defendants, contended that the legacies were specific and had been adeemed by the sale. That there was no general rule which made all bequests of stock general legacies, but that all such cases depended on the intention of the testator to be collected from the will. That here beyond doubt the testator contemplated leaving the particular shares he possessed at the time, or why dispose of fifteen and a half, the exact number which he was then entitled to ?

Again, the shares savoured of the realty and were personal estate no farther than the statute made them so ; they passed by bargain and sale, and differed from the public stocks, which could be left to a charity, while these shares could not ; that they were in the nature of chattels real, and the bequest of them had been adeemed by their sale by the testator in the same way as a bequest of a leasehold or of a particular mortgage or of turnpike tolls would be adeemed.

[They cited *Avelyn v. Ward* (1), *Parrott v. Worsfold* (2), *Pattison v. Pattison* (3), and other cases.]

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Mr. C. P. Cooper and *Mr. W. H. Clarke* for other defendants.

THE MASTER OF THE ROLLS :

My present impression is, that these are general legacies, and that neither the expressions in the will nor the difficulty in purchasing and selling the shares prevent that construction.

The principal question, however, is whether the connection of the subject of the gift with real estate is such as to make the legacies specific. I will examine the Act of Parliament and consider the point.

June 27.

THE MASTER OF THE ROLLS :

In the gift the testator has used no words of description or reference, by which it appears that he meant to give the specific and particular shares which he then had.

Various arguments depending on the general scope and effect of the will, were used for the purpose of showing that the testator, in giving the precise number of shares which he possessed, must have had those shares in his contemplation and none other, and

(1) 1 Ves. Sen. 420.

(3) 36 R. R. 241 (1 My. & K. 12).

(2) 21 R. R. 248 (1 Jac. & W. 594).

consequently must have meant specific gifts of them ; and it was insisted upon that these shares were an interest in the land, and that although the Act declares them to be personal estate, and transmissible as such, yet still they must be considered as chattels real, and that a legacy of an interest in them must be a specific legacy.

It was further argued that the shares of this canal were so rarely brought to market, that they could not be considered as transferable or purchasable for money, and could not be considered as gifts of particular things which the executors could purchase out of the assets.

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It is, however, clear that the testator, if he had meant to give only the shares which he had, might have designated them as “ his,”—that the mere circumstance of the testator having, at the date of his will, a particular property, of equal amount to the bequests of the like property which he has given without designating it as the same, is not a ground upon which the Court can conclude that the legacies are specific ; and upon the whole context of the will, it does not appear to me, that the trusts on which the legacies are given, afford sufficient evidence that the testator meant those legacies to be specific.

There is no description or reference to show that he meant to give the particular shares which he had at the date of his will, nor any trust from which it can, as it appears to me, be concluded, that he must have meant only such shares as he had at the respective times of making his will and of his death.

As to the nature of the property, the canal and lands are vested in a corporation. The lands were purchased, and the canal constructed by means of money raised by subscriptions. The capital so raised is divided into 2,600 shares, which are to be deemed personal estate, and to be transmissible as such ; and the shares, though not frequently sold, are nevertheless occasionally bought and sold, and may be had for money, and the question is, whether the legacy, if it be not otherwise specific, is made so by reason of the nature of this *property. This, however, is not the gift of freehold or leasehold estates, or of a sum to be paid out of lands, or out of the produce of lands, in such a form as to make it specific. The testator had no share in the canal at the time of his death, though he had the means by which the shares might have been obtained ; and conceiving that the words of his will are not such as to indicate that he meant to give the particular shares at the date of his will it is to be considered what he did give. He intended his legatees to have so many canal shares, but not giving the specific shares that

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he had, he gave nothing which was distinguished or severed from the rest of the testator's estate, but in effect gave such an indefinite sum of money as would suffice to purchase so many shares as he had given, those shares being any such shares as could be purchased, and not certain particular and defined shares.

This bequest does not appear to me to have any of the qualities of a specific legacy, and I am therefore of opinion, that the three bequests of canal shares which are given by this will, are to be considered as general legacies.

1840.
June 4, 5, 8.

Rolls Court.

Lord
LANGDALE,
M.R.

[522]

ENGLAND v. DOWNS (1).

(2 Beav. 522—537; S. C. 9 L. J. (N. S.) Ch. 313; 4 Jur. 526.)

If a woman entitled to property, during the treaty for marriage, represents to her intended husband that she is so entitled that upon the marriage he will become entitled *jure mariti*, and if during the same treaty she clandestinely conveys away the property in such manner as to defeat his marital right, and secure to herself the separate use of it, and the concealment continues until the marriage, a fraud is thus practised on the husband, and he is entitled to relief.

Direct misrepresentations, or wilful concealment with intent to deceive the husband, would entitle him to such relief; and if both the property and the mode of its conveyance pending the marriage treaty, be concealed from the intended husband, there is still a fraud practised on him; cases have however occurred in which concealment, or rather the non-existence of communication to the husband, has not been held fraudulent; and whether fraud is made out must depend on the circumstances of each case.

As a conveyance made immediately before her marriage is *primâ facie* good, it is to be impeached only by the proof of fraud.

In August a widow, having a second marriage in contemplation, settled her property on herself for life, for her separate use, with remainder to the children of her first marriage, and in October following she married. The settlement was prepared by her direction, without the privity or assent "of her then intended husband." In a suit to carry the settlement into execution, the second husband insisted on the settlement being a fraud on his marital rights, but it was not proved that in August he was "the intended husband." Held, that the evidence was insufficient to impeach the deed.

Assignment of all and every the household goods, &c. the particulars whereof were stated to be more fully set forth in an inventory signed by the grantor, and annexed thereto. There was no such inventory: Held, nevertheless, that the assignment was effectual, it appearing from the answer of the party resisting its validity, that the particulars could be ascertained.

THE question in this cause was, whether a settlement made by Mrs. Joan Mason, since deceased, shortly before her marriage with

(1) *Downes v. Jennings* (1863) 32 come in question as to marriages since
Beav. 290. In England the doctrine Jan. 1, 1883 (Married Women's
of fraud on martial right cannot now Property Act, 1882).—F. P.

the defendant, Mr. Broad, without his concurrence, was or not a fraud on his marital rights.

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William Mason, by his will, gave all his real and personal estate to his widow Joan Mason. The testator died in 1816, leaving his widow and three daughters, one of whom was plaintiff in this suit, surviving him. The widow proved the will, entered into possession, and continued to carry on the testator's business of victualler.

By indentures of the 5th of August, 1818, in consideration of natural love and affection, Mrs. Joan *Mason conveyed her freehold and leasehold property to trustees, upon trust as to part near the Magdalen Chapel, Bristol, for such uses as she, whether covert or sole should appoint; and in default for her separate use for life, with remainder to her heirs; and as to the other part of the property for her separate use for life, with remainder to her three daughters and their children. She also assigned to trustees, "all and every the household goods, furniture, plate, linen, china, books, stock in trade, brewing utensils, and all other the effects of her Joan Mason," the particulars whereof were stated "to be more fully set forth and expressed in an inventory thereof signed by the said Joan Mason, and thereunto annexed," upon trust for herself for her separate use for life, and after her death, to sell the household goods, &c., and thereout to pay off a mortgage on part of the freehold property situate in Bath Street, and to divide the surplus between her three daughters.

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There was in fact no inventory of the household goods, &c., signed by Mrs. Joan Mason, or annexed to the deed. The execution of the deed was not accompanied or followed by any change or alteration in the apparent ownership or possession of the property comprised in it; and until her second marriage, which afterwards took place, Mrs. Mason acted as owner of the property in the same manner as she had previously done.

On the 26th of October, 1818, Mrs. Joan Mason married the defendant Mr. Broad, who entered into the receipt of the rents of the freehold and leasehold property comprised in the settlement, and took possession of, and apparently dealt with the personal chattels as his own; he thenceforward carried on the business in *his own name until August, 1832, when he sold the business, stock, and effects for 871*l.*, and applied 150*l.* part thereof in satisfaction of trade debts, and paid 200*l.* in discharge of the mortgage of the Bath Street property, upon which the title deeds of that property were delivered over to Mr. Broad.

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Mrs. Joan Broad died in 1833, and this bill was filed in 1836, by one of the three daughters by her former marriage, against Mr. Broad and the trustees, for the purpose of having the trusts of the deed of the 5th of August, 1818, carried into execution for their benefit.

It appeared from the statements in the answer, that in 1829, Mrs. Broad, without her husband's consent, mortgaged a part of the freehold property, over which under the settlement she had a power of appointment, for 160*l.*, of which 150*l.* being the balance after payment of costs, was given to the plaintiff by Mrs. Broad, her mother; it also appeared that in the year 1831 Mrs. Broad sold the same piece of land for 364*l.*, or thereabouts, and thereout paid the mortgage for 160*l.* and interest, and applied the remainder to her own private purposes, and principally in making presents to the plaintiff and her children. The defendant Mr. Broad, however, said that he had been made a party to the conveyance, but that he had never executed it, and that it had not been tendered to him.

Mr. Broad, by his answer, insisted that the settlement had been made pending the time he was paying his addresses to Mrs. Mason, and wholly without his concurrence or knowledge; that Mrs. Mason was the ostensible owner of the property on her marriage, and that the settlement was a fraud on his marital rights.

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The execution of the settlement was proved by Mr. Davies, a solicitor, who, in cross-examination, amongst other things stated, that Mrs. Joan Mason having about the middle of 1818 stated that she was about to be married, he had advised a settlement to be made, and that it was his strong belief that in the course of the preparation of the settlement, he advised the joining therein of her intended husband, for the purpose of barring him; that "he did not think the settlement had been prepared or executed with the privity or assent of her then intended husband, and that its existence was not, to his knowledge, communicated to him before the marriage. That in his communications with Joan Broad, she desired that the said deed should be prepared and executed without the privity of her then intended husband."

No evidence was read by the defendants at the hearing, to show who was the person described by this witness as "her then intended husband."

Mr. C. P. Cooper and *Mr. Dixon* (in the absence of *Mr. Pemberton*) for the plaintiff:

Assumed that at the time of the execution of the settlement,

Mr. Broad was paying his addresses to the settlor, but they argued that there was no proof of misrepresentation or concealment up to the time of the marriage, and that concealment alone was not sufficient to invalidate the deed. That it did not appear that the marriage took place on the faith of Mrs. Joan Mason being the absolute owner of this property; nor did it appear that the husband had made any enquiries respecting it, and that therefore there could be no disappointment on his part. That the husband must have had notice of the settlement before or soon after the marriage, and had *acquiesced in it by paying off the mortgage, and permitting his wife to sell a portion of the property. That the *onus* of proof lies on the defendant, who had failed in making out any case, and had himself taken no proceedings to set aside the settlement. They cited *St. George v. Wake* (1), and the cases there referred to.

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Mr. Kindersley and *Mr. James Russell*, for Mr. Broad, read no part of their evidence showing that Mr. Broad was the person with whom Mrs. Joan Mason contemplated a marriage at the date of the settlement; but they argued, that the circumstances of the case showed clearly that a fraud was intended: that the deed was voluntary, and, by her express desire, had been prepared without the privity of her intended husband, while she remained the ostensible owner to the day of her marriage. They also argued that Broad, after the marriage, had dealt with the property as his own; and that, as to the household furniture, &c., the deed was void for want of a schedule or inventory defining what was intended to pass: *Weeks v. Maillardet* (2).

Mr. Tinney and *Mr. Simons* for trustees; *Mr. Spurrier* and *Mr. Elderton* for the other claimants; and *Mr. J. Taylor* for the plaintiff's husband.

Mr. Pemberton, in reply, insisted that there was no evidence of any marriage being in contemplation between Mrs. Mason and Mr. Broad at the time of the settlement, or even that they were acquainted; that it must be assumed, that marriage in general, was in her contemplation, and not a marriage with this particular person; and that the case was like that of *Lady Strathmore v. Bowes* (3), where a settlement was made by *Lady Strathmore with

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(1) 36 R. R. 389 (1 My. & K. 610).

(3) 1 R. R. 76 (1 Ves. Jr. 22).

(2) 14 East, 568.

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the concurrence of Mr. Grey, the then intended husband, and a few days after the execution she determined to marry Mr. Bowes; the marriage took place the following day, and the settlement was held valid against Mr. Bowes, for a marriage with him was not then in contemplation. That the rule could not apply to real estate, the inheritance of which a husband would not take by marriage, and as to which he would only become tenant by the curtesy; he drew a distinction between courtship and engagement in cases of this description, contending that though a concealed settlement might be invalid pending an engagement, yet the same result did not follow if made pending courtship.

June 8.

THE MASTER OF THE ROLLS:

The bill in this cause prays that a settlement, which was made for the benefit of the plaintiff and her two sisters, the defendants Jane Barton and Eliza Davis, by their late mother, Joan Mason, who became the wife of John Thiery Broad, may be carried into execution.

Joan Mason was a widow with three children, and, under the will of her first husband, she was entitled to some freehold and leasehold property, to some furniture, and to the stock in trade, with which she carried on business as a victualler.

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Contemplating a second marriage, she considered that she ought to make a provision for her children by the first, and being informed that a will which she had made, would upon her marriage become ineffectual, she made a settlement, and thereby provided that a portion of her freehold property should be subjected to *her own power of appointment, but that subject to such power of appointment, that part of her estate over which the power extended, together with all the rest of her property, should be limited to her own separate use for her life, with remainder for her three daughters in the manner therein mentioned.

In the execution of this settlement, so far as it made provision for her children, she was performing a moral duty: in the circumstances in which she was placed it was clearly her duty, before she placed herself and her property in the power of her second husband, to secure a provision for her children by her first husband, from whom her property was derived; but in performing a duty towards her children, she had no right to act fraudulently towards her second husband.

If a woman, entitled to property, enters into a treaty for

marriage, and during the treaty represents to her intended husband that she is so entitled, that upon the marriage, he will become entitled *jure mariti*, and if, during the same treaty, she clandestinely conveys away the property, in such manner as to defeat his marital right, and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt but that a fraud is thus practised on the husband, and he is entitled to relief.

The equity which arises in cases of this nature depends upon the peculiar circumstances of each case, as bearing upon the question, whether the facts proved do or do not amount to sufficient evidence of fraud practised on the husband. It is not doubted that proof of direct misrepresentations, or of wilful concealment with intent to deceive the husband, would entitle him to relief; but it is said that mere concealment is not, in *such a case, any evidence of fraud, and that if a man without making any enquiry as to a woman's affairs and property, thinks fit to marry her, he must take her and her property as he finds them, and has no right to complain, if, in the absence of any care on his part, she has taken care of herself and her children without his knowledge.

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This proposition, however, cannot be admitted as stated; and clearly a woman, in such circumstances, can only reconcile all her moral duties by making a proper settlement on herself and her children, with the knowledge of her intended husband.

If both the property and the mode of its conveyance, pending the marriage treaty, were concealed from the intended husband, as was the case in *Goddard v. Snow* (1), there is still a fraud practised on the husband. The non-acquisition of property, of which he had no notice, is no disappointment, but still his legal right to property actually existing is defeated, and the vesting and continuance of a separate power in his wife over property which ought to have been his, and which is, without his consent, made independent of his control, is a surprise upon him, and might, if previously known, have induced him to abstain from the marriage.

Nevertheless, cases have occurred in which concealment, or rather the non-existence of communication to the husband, has not been held fraudulent, and whether fraud is made out must depend on the circumstances of each case,—as an unmarried woman has a right to dispose of her property as she pleases, and as a conveyance made immediately before her marriage is *primâ facie* good, it is to be impeached only by the proof of fraud.

(1) 25 R. R. 111 (1 Russ. 485).

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In the present case the plaintiff alleges that no fraud is proved, and that any circumstances which tend to create doubt, ought to have no weight, in a case where no regular proceeding has been adopted to set aside the settlement.

The defendant Broad insists that fraud is proved ; that during the treaty, and at the time of the marriage, Mrs. Mason was in the receipt of the rents of the freehold and leasehold property, and in the possession as apparent owner of the personal chattels ; that the settlement was entirely concealed from him till after the marriage, and that he never acquiesced in it.

The settlement was executed on the 5th of August, 1818 : the marriage did not take place till the 14th of October, 1818, being more than two months afterwards.

The settlement being proved by William Davies, the defendant Broad has cross-examined that witness, to prove that when it was prepared, a fraud upon him was intended ; and Davies says that Mrs. Mason told him she was about to be married, and instructed him to prepare the settlement ; he does not think it was prepared or executed with the privity or assent of her then intended husband ; its existence was not, to the witness's knowledge, communicated to him (the then intended husband) before the marriage ; and that in his communications with Mrs. Broad, she desired that the deed should be prepared and executed without the privity of her then intended husband. It was observed upon this evidence, that the defendant, John Thiery Broad, is not stated by the witness to have been the then intended husband. The observation is true, and is the more remarkable, upon its appearing that in one of the interrogatories upon which this evidence is given, the *witness was distinctly asked, " Whether the settlement was prepared or executed with the knowledge, privity, or assent of the defendant John Thiery Broad ; was its existence communicated to him before the marriage ? " The answer, without naming Broad, or speaking of the knowledge which the intended husband might have, is, that the witness " did not think the deed was prepared with the privity or assent of her then intended husband."

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However probable it may be that John Thiery Broad was then the intended husband of Mrs. Mason — and in the opening of this case the fact was assumed to be so — the observation cannot be otherwise than material. In *Lady Strathmore's* case, on the 10th of January, when the settlement was made, Mr. Grey was her intended husband, and the settlement was made in contemplation

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of a marriage with him ; on the 17th of the same month, and only a week after the execution of the settlement, she married Mr. Bowes, who complained of the settlement. In that case Lord THURLOW thought, that marriage in general was the object of Lady Strathmore ; and for any thing to the contrary which appears in the evidence of Davies, such may have been the object of Mrs. Mason when this settlement was prepared and executed—the treaty with Broad may have commenced subsequently.

Even if Broad was the then intended husband, more than two months elapsed between the execution of the settlement and the time when the marriage took place, and proof of a desire to conceal at the time when the settlement was executed, is not, of itself, proof that the same desire was continued and acted upon up to the time of the marriage. The desire to conceal the settlement, up to the time when it was completed, might *have arisen from a desire to have the business completed before the communication was made, from a wish to protect herself from importunity and against any yielding on her own part. Before the execution of the settlement, she might fear her power to resist persuasion ; afterwards she might say it is done, and if at all, you must take me with the settlement. This is mere hypothesis, not warranted by any facts proved in this case ; but the probability of such a case shows that proof of concealment till the settlement was executed is not necessarily proof of concealment up to the time of the marriage ; it is evident that there might have been a full communication without the knowledge of Davies.

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In another part of his evidence, Davies proves that upon the execution of the settlement there was no change or alteration in the possession of the property comprised therein, that Joan Mason acted as the owner up to the time of the marriage, and that upon the marriage Broad took possession, and appeared to deal with the personal chattels as his own, and he carried on the business, which had previously been conducted by his wife, in his own name, and was from the time of the marriage in the apparent absolute ownership of all the goods and effects of the premises.

This is all the evidence adduced as to any thing which took place before and up to the time of the marriage ; and I do not think that it amounts to distinct proof, that the settlement was executed during a treaty for marriage between the defendant Broad and Joan Mason, the mother of the plaintiff : or that Joan Mason desired the preparation and execution of the settlement to be

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concealed from the defendant Broad: or that Broad was ignorant of the settlement at the time of the marriage; all these allegations are, I think, consistent with the *evidence of Davies, but do not appear to me to be proved by it.

The only other evidence is that which is read by the plaintiff from the answer of Broad, and thereby it appears that from the time of the marriage up to August, 1832, Broad carried on the business of a victualler; that he then sold the business, together with the stock in trade and effects, to a Mr. Davies at a valuation, and the amount of the valuation, after deducting excise duty, was 87*l.* 18*s.* 11*d.*: that the sum of 107*l.* 7*s.* 8*d.* was the value of household goods and utensils purchased by himself with his own money after his marriage: that 152*l.* 11*s.* 1*d.* was applied in satisfaction of trade debts due when the business was disposed of: that 200*l.* was paid for principal money, and 2*l.* 5*s.* 5*d.* for interest due on a mortgage charged on a part of the freehold estate comprised in the settlement. He further says, that the valuation comprised the good-will of the business, the stock of spirits, and some other things not comprised in the settlement: and that he always treated the effects as his own absolute property, and disposed of them accordingly.

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Upon this part of the evidence, it is proper to observe, that at the date of the settlement the freehold estate in Bath Street, being part of the freeholds comprised in the settlement, was subject to a mortgage of 250*l.*, and that one of the provisions of the settlement was, that on the sale of the household goods, stock in trade, and effects, which was intended to be made on the death of Mrs. Broad, the mortgage on the Bath Street estate was to be paid out of the proceeds of the sale. Mr. Broad says that 50*l.*, part of the mortgage money, was paid by Mrs. Mason about a month before her marriage; 200*l.* remained due, and by the settlement *was charged on the proceeds of the sale of the household goods and effects. The sale was made in the lifetime of Mrs. Broad, before the time mentioned in the deed; but the payment of the mortgage out of the proceeds appears to me to show, that Mr. Broad at that time knew of the deed, and of that provision contained in it, and so far at least acquiesced in it. If there had been no such deeds, he would have been seized of the freehold in right of his wife, and the proceeds of the sale of the goods and effects would have been absolutely his; and if he had thought fit to pay off the mortgage, he might have continued the charge on the land for his own benefit.

All that he says is, that when the mortgage was paid off, the title deeds of the estate were given up to him.

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↓
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He further says, that upon his marriage he entered into the receipt of the rents and profits of the freehold and leasehold estates comprised in the settlement, and that he paid the rents reserved on the leaseholds, and also paid insurances.

He further states his belief, that in the year 1829, his wife, Joan Broad, without his consent, mortgaged a part of the freehold, namely, that part over which the settlement gave her a power of appointment, to Mr. Strickland for 160*l.*, of which 150*l.*, being the balance after payment of costs, was given to the plaintiff by Mrs. Broad, her mother, and that in the year 1831 Mrs. Broad sold the same piece of land to Mr. Boley for 364*l.* or thereabouts, and thereout paid Strickland's mortgage and the interest thereon, and applied the remainder, after paying costs, to her own private purposes, and principally in making presents to the plaintiff and her other children. He says that he was made a party to *the conveyance to Boley, but that he never executed it, and it was not tendered to him.

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As Mr. Broad was in possession of the property, it could not be sold, and possession be delivered to a purchaser without his knowledge. If there had been no settlement, or if the settlement had been fraudulent and void, Mr. Broad, in right of his wife, would have been entitled to receive the rents, and the estate could only be sold by means of the power conferred by the settlement. He now says, that the settlement was fraudulent and void, and yet in 1831 we see him acquiescing in this sale.

Mrs. Broad died on the 14th of March, 1833, and this bill was filed on the 29th of January, 1836. The defendant, Mr. Broad, notwithstanding his present allegation of fraud, has never filed any bill to be relieved from the settlement as fraudulent, and on the whole case, considering that there is no sufficient proof that a treaty of marriage was subsisting between the defendant Mr. Broad, and Mrs. Mason at the time when the settlement was executed :—that there is no sufficient proof of concealment up to the time of the marriage :—that if Mr. Broad did not know of the settlement before or at the time of the marriage, he certainly did know of it not long afterwards, and permitted his wife to act against his interest in execution of the power given to her by the settlement; and never has attempted, and does not now attempt, to set it aside. I think that upon this bill, and upon the evidence before me, I am bound to give the plaintiff the relief which she seeks.

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I have understood, from the statement made during the hearing, that the evidence which has been stated to me is not the whole evidence which has been taken in *the case; my opinion is formed only on the evidence which has been produced.

The case of *Weeks v. Maillardet* (1) was cited for the purpose of showing, that as to the personal chattels, the deed was void for want of a schedule; but the deed in this case is not expressed in the same manner as was the deed in the case cited, and from the particulars which are stated by the defendant Broad, in his answer, I apprehend that there will be no difficulty in ascertaining what were the personal chattels, comprised in the deed, which were sold by the defendant Broad in August, 1822.

[The original report here sets out the decree at length.]

1840.
Feb. 8.

Rolls Court.
Lord
LANGDALE,
M.R.
[537]

BUSK v. BEETHAM.

(2 Beav. 537—538.)

A plaintiff being ordered to pay costs went abroad (as was sworn, upon belief and not denied) permanently and to avoid payment: he was ordered to give security for costs, and the proceedings in the suit were in the mean time stayed.

Effect of affidavits as to facts on belief only, is to put the opposite party to answer them.

On the 9th of November an order was made for dissolving an injunction in this cause with costs to be paid by the plaintiff; the plaintiff was present when the order was made, but he afterwards left England for France.

The costs being taxed at 37*l.*, a *subpœna* for payment issued, but the attempts to serve it proved ineffectual; a *fieri facias* afterwards issued, under which the sheriff seized the goods in the plaintiff's house; but the execution was defeated by a previous assignment which had been made by the plaintiff.

It was now moved, on the part of the defendants, that the plaintiff should give security for costs, and that in the mean time all further proceedings might be stayed. The application was supported by affidavits, stating the above circumstances and that the deponent *believed the plaintiff had left this country and gone to reside in France permanently, "with the intention of depriving the defendant of his legal remedy, and of avoiding the service of the *subpœna* and the process of this Court."

There was no affidavit filed in opposition.

(1) 14 East, 568.

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Mr. Pemberton and Mr. Keene, for the motion.

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Mr. Addis, *contra* :

The witnesses speak only as to their belief of matters not within their knowledge, without stating the facts on what their belief is founded; this is insufficient evidence. * * *

THE MASTER OF THE ROLLS :

The affidavits are certainly on the belief of the parties; but this is quite sufficient to call upon the plaintiff to answer them. No affidavits have, however, been produced on his behalf, and under such circumstances the order must be made.

GRENFELL *v.* THE DEAN AND CANONS OF WINDSOR AND OTHERS (1).

(2 Beav. 544—551.)

1840.
May 7.
June 17.

Rolls Court.

Lord
LANGDALE,
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A canon of Windsor granted the canonry and the profits, &c. to the plaintiffs, to secure a sum of money. So far as it appeared on an interlocutory application, the estates were vested in the corporation, and the canon was entitled to an aliquot share of the profits. There was no cure of souls, and the only duties were residence within the castle, and attendance in the chapel twenty-one days a year: Held, upon this state of circumstances, that the security was valid, and a receiver of the profits was appointed.

Principles of public policy on which pay, pensions, &c. are held unalienable.

In April, 1829, the defendant, the Rev. R. A. Musgrave, was appointed by letters patent, one of the prebends or canons of the collegiate church or free chapel of St. George, within his Majesty's castle at Windsor, an appointment which produced an income of about 1,200*l.* a year.

Being in want of money, Mr. Musgrave, in October, 1838, granted to the plaintiffs the said prebend or canonry, and all the annual income arising from renewal fines, rents, and other perquisites, emoluments, and advantages to which he was entitled as one of such prebends or canons, and he also assigned to them two several policies of insurance, for securing to the plaintiffs the repayment of the sum of 12,000*l.*

It appeared from the answer of Mr. Musgrave, that the income arose from estates possessed by the corporation, the rents and

(1) *In re Mirams* [1891] 1 Q. B. 595, 60 L. J. Q. B. 397, 64 L. T. 117.

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proceeds of which were usually divided half yearly between the dean and twelve canons ; but it did not appear that there was any property vested in the Dean and Canons independently of the corporation.

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There did not appear to be any spiritual duties attached to the office, nor any cure of souls, but the answer represented, that the corporation was governed by certain statutes and ordinances, whereby certain duties were imposed upon the members of the said corporation to be by them performed, each member of the said corporation having the privilege of residing in a *house within the walls of the said castle of Windsor ; and that if any member of the corporation failed to perform his appropriated duties, he, by virtue of the said statutes and ordinances, forfeited his right to share in the division of the surplus income of the said corporation, and in lieu thereof was entitled to receive a small fixed stipend, of the amount, as the defendant believed, of 25*l.* a year only ; and that the members of the corporation were in such cases entitled to the residue of his share of the surplus income of the corporation. That one of the duties, by the said statutes and ordinances imposed upon each of the said canons, was to reside in one of the said houses within the walls of the said castle of Windsor, and to attend divine service in the said chapel of St. George, at Windsor, twenty-one days in each year.

The defendant, Mr. Musgrave, having made default in payment of the interest and in keeping up the policies, the plaintiffs filed this bill for the purpose of obtaining payment, and for an injunction and receiver ; on the 11th of January, 1840, an order was made, on affidavit, before answer, restraining the Dean and Canons from paying, and the defendant from receiving, the income of the canonry and for the appointment of a receiver.

The defendant, Mr. Musgrave, having put in his answer, it was now moved on his behalf, to discharge the order for an injunction and receiver.

Mr. G. Richards, in support of the motion, contended that it was contrary to public policy to permit the assignment of ecclesiastical preferments like the present. * * *

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Mr. Pemberton and *Mr. W. T. S. Daniel*, *contrà*, contended, that it did not appear whether this was an ecclesiastical appointment or not, but it was confessedly one without cure of souls, and

considering the alleged duties, *was a mere sinecure income, assignable like other property. That there existed no rule of public policy, independent of the restraining statutes, which prevented an ecclesiastic from dealing with his temporalities: *Metcalf v. The Archbishop of York* (1). That the case of *Cooper v. Reilly* (2) did not apply; in that case there was no patent place, no permanent office, but a right to receive an annual salary for certain duties, in default of the performance of which, no salary was payable; that it was manifest that such duties could not be performed by a receiver; and that this must have formed the ground of the decision on the motion, though in truth that case had never been decided on the merits. * * *

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Mr. Richards, in reply. * * *

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The plaintiffs, being under the necessity of filing this bill, in consequence of the neglect of the defendant to pay either principal or interest on the money advanced, have obtained an order for a receiver. I do not enter into the question whether the order was opposed at the time, for the defendant had clearly a right to pursue any course he pleased upon that occasion, and supposing him to have then thought, or to have been then advised, that this order was proper, still it was perfectly competent for him afterwards, upon a more careful enquiry, to bring under the consideration of the Court the question, whether the order ought to be sustained. It is now contended that the order should be discharged on two grounds; the first is, that it is an order which cannot be enforced for any useful or profitable purpose to the plaintiffs without the assent and concurrence of the defendant, *Mr. Musgrave*. *Mr. Musgrave*, being a canon of Windsor, has, it is said, a duty to perform, that is, he is to reside twenty-one days within the precincts of the castle of Windsor, and during that time he is to attend divine service, and if he does not, the aliquot share or part of the general revenues of the corporation which he would otherwise be entitled to, is to be reduced to a certain small sum. He therefore says, "If I do not choose to attend during that time, the small sum only, and not the larger

(1) 38 B. R. 98 (6 Sim. 224; and 1 My. & Cr. 547). was Assistant Parliamentary Counsel to the Treasury.—O. A. S.

(2) 1 Russ. & My. 560. The assignor

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sum, will have to be received, and therefore the plaintiffs and the receiver will be unable to receive the income for the purpose of applying it in diminution or in exoneration of my debt." It cannot be supposed that Mr. Musgrave will be so unwise, as, rather than give the plaintiffs the benefit of that which they are clearly entitled to, wholly to neglect to perform the duty which entitles him to the receipt of this income, and thus leave the debt standing, and the *interest accumulating upon it. I cannot presume that any such degree of absurdity will mark his future conduct.

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In the next place it is said that he has no right to assign this canonry, because the share of the revenues was given to him in consideration of certain future duties to be performed. Now if it had been made out that the duty to be performed by him was a public duty, or in any way connected with the public service, I should have thought it right to attend very seriously to that argument, because there are various cases in which public duties are concerned, in which it may be against public policy, that the income arising for the performance of those duties should be assigned; and for this simple reason, because the public is interested, not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them. Such is the reason in the cases of half-pay where there is a sort of retainer, and where the payments which are made to officers, from time to time, are the means by which they, being liable to be called into public service, are enabled to keep themselves in a state of preparation for performing their duties. If, therefore, they were permitted to deprive themselves of their half-pay, they might be rendered unable promptly to enter upon their duties when called upon, and the public service would be thereby greatly injured. So also, where a pension or remuneration is given for a purpose which tends less directly to the public benefit, as for instance was the case in *Davis v. The Duke of Marlborough* (1); there the pension was given to the Duke of Marlborough as a memento of the gratitude of the nation, and as a reward for his distinguished public services; and it was there the intention of the Legislature that it should be kept in mind that it was for *those great services it was given. In that case the pension was held inalienable, because it was considered that one of the objects of giving the pension, namely, for having a perpetual memorial of national gratitude for public services would be entirely lost; and so in the course of that

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case Lord ELDON said, in the way of illustration, and in allusion to the pension of a great public officer, that it could not be aliened, because that public officer must not be allowed to fall into such a situation as to make it difficult for him, in consequence of any pecuniary embarrassment, to maintain the dignity of his office. With respect to the case of *Cooper v. Reilly*, some doubts have been expressed as to the propriety of the decision on the motion for a receiver; but the question was, whether the salary was assignable on the grounds of public policy, and that depended on the nature of the duty and the interest of the public to secure the payment of the salary to the person by whom the duty was to be performed. If in this case the residence in Windsor Castle, and the attendance on divine service had been stated in the answer, or in any way shown to be for the benefit of the public, or for the maintenance of the dignity of the Sovereign for the benefit of the public, I should have thought the case worthy of a very different consideration. But from all which is stated in this answer that is not the case; it is a service to be performed for the benefit of the party himself; and, therefore, upon the case as it now stands upon this answer, and without saying there may not be other facts which may be material to be ultimately considered, it appears to me that the security of the plaintiffs is valid, and I must therefore refuse the motion with costs.

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NOTE.—In *Butcher v. Musgrave*, being an action by another mortgagee, the Court of Common Pleas, on the 23rd June, 1840, *decided that an action of ejectment would not lie for the canonry in question, it being a mere office, of which the sheriff could not give possession; and that ejectment did not lie for the residentiary house in which the canon resided, as it appeared vested in the corporation, and not in the canon.

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CARTER v. BENTALL (1).

(2 Beav. 551—559; S. C. 9 L. J. (N. S.) Ch. 303; 4 Jur. 691.)

A testator gave the income of his personal, and the rents of his real estate, to his daughter for life, for her separate use, and after her decease and the decease of his wife, he gave the residue of his real and personal estate to trustees, in trust to sell and pay half the produce "to the issue" of his daughter, equally, to be paid at twenty-one; and if only one child,

1840.
May 4, 5.
June 27.
Rolls Court.
Lord
LANGDALE,
M.R.
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(1) *In re Hopkins' Trusts* (1878) 9 53 L. J. Ch. 787, 50 L. T. 454; *In re*
Ch. D. 131, 47 L. J. Ch. 672; *In re Birks* [1899] 1 Ch. 703; reversed [1900]
Warren's Trusts (1884) 26 Ch. D. 208, 1 Ch. 417.

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then to such one child; and he directed the trustees to apply the interest in the maintenance and education of such issue; "and in default of such issue" he gave such moiety of the residue between his nephews and nieces living at the death of his daughter. And he gave and devised the other moiety of the residue of his estate at the decease of his wife and his daughter without issue, to the same trustees, to permit his godson to receive the income for life, and after his decease to certain charities: Held, that "issue" in the first clause was to be construed "children;" but in the second clause in its ordinary unrestricted sense; and that consequently the gift over of the first moiety, upon the death of the daughter without issue was good, but was too remote as to the second.

The word "issue" in a will, held on the context to have two different meanings as to two moieties of a devised estate.

THIS cause was instituted for the purpose of carrying into execution the trusts of the wills of Thomas Mendham and of his daughter Sybilla Carter; and the question arising upon the construction of the will of Thomas Mendham, was whether certain limitations therein contained were void for remoteness.

At the date of his will the testator had a wife, Elizabeth, and a daughter Sybilla.

By his will, dated 23rd of March, 1810, the testator gave the dividends of his Long Annuities to his wife for life, and an annuity to his godson for life; and he "gave and bequeathed to his daughter, Sybilla Mendham, all the interest, dividends, income, and produce of his whole personal estate undisposed of by his will, and the rents, *issues, and profits of his real and leasehold estates whatsoever and wheresoever, and of what nature or kind soever, for and during the term of her natural life, for her sole and separate use and benefit," and after directing his India bonds and Exchequer bills to be sold and invested, and the interest to be paid to his daughter for life, and after her decease to go along with the residue; the testator, after the decease of his wife and daughter Sybilla, gave, devised, and bequeathed the residue of his real and personal estate to trustees, and their heirs, executors, administrators, and assigns, upon trust to sell and invest the produce. The testator then proceeded as follows: "And upon this further trust, to transfer and pay one moiety, or half part of the whole clear residue of my estate, whether in the public funds or on any other security, to the issue of my said daughter Sybilla, if she shall happen to marry and have any such, equally between them, share and share alike, and to be paid and transferred to him, her, or them at their respective age or ages of twenty-one years, and if only one child, then to such one child to and for his, her, or their respective advantage and benefit. And I order and direct my said

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trustees, &c., to lay out the dividends, interest, and profits thereof in the mean time in the maintenance and education of such issue, and the overplus (if any) to be in like manner laid out in the public funds for their use and benefit as aforesaid. And I do further direct my said trustees, &c. to transfer and pay the same to him, her, or them accordingly. And in default of such issue I give, devise, and bequeath the said moiety, or half part of the residue of my estate, unto and amongst all my nephews and nieces who shall be living at the time of the decease of my said daughter, in the shares following," which he thereupon stated; "and as to the other moiety or half part of the said residue of my estate after the decease of my wife and my daughter *Sybilla without issue," the testator gave the same to his trustees in trust to permit Thomas Newson Mendham to receive the interest for life, and after his decease he gave it to Bartholomew's Hospital, St. Thomas's Hospital, the Society of the Sons of the Clergy at Ipswich, and the Haberdashers' Company, to enable them to relieve and assist their patients, aged and infirm and decayed members, and impotent persons, in their several and respective departments.

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The testator's wife died in her husband's lifetime, and the testator died in 1812: his daughter Sybilla, who was his heiress-at-law and sole next of kin, proved the will, and in 1813 suffered a recovery of a moiety of the hereditaments, and declared the uses to herself in fee.

She married Mr. Carter in 1815, who died in her lifetime, and she died in 1835 without having had any child. The plaintiffs were parties claiming under her will.

Thomas Newson Mendham died in 1817.

Mr. Pemberton and *Mr. Roupell* for the plaintiffs, as to the first moiety, contended that the gift over in default of issue of Sybilla was too remote; that it was consequently void as to the personal estate, and as to the real estate the effect would be to give Sybilla an estate tail, in order to let in her issue; otherwise, though she had children, the property would go over; they argued that this estate tail had been barred by the recovery, and passed under the will of Sybilla.

That as to the other moiety, there was no gift to her issue at all, but the gift over was upon her death without *issue, which gift, as in the case of the former moiety, was void for remoteness, and that the daughter took an estate tail therein by implication. * * *

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Mr. G. Turner and Mr. Hallett, for the representatives of one of the testator's nephews, limited their argument to the first moiety, and contended that * * "issue" must be construed "children," and that the gift over in default of children would consequently *be valid. * * *

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Mr. Hodgson and Mr. Spurrier, for Bartholomew's Hospital, contended, that * * the word "issue" could not have two different senses in different parts of the same will: *Goodright v. Dunham* (1); they also cited *Porter v. Bradley* (2), *Trickey v. Trickey* (3), *Ellicombe v. Gompertz* (4), *Kevern v. Williams* (5), *Pinbury v. Elkin* (6) [and other cases].

Mr. Bethell and Mr. J. Evans, for St. Thomas's Hospital.

Mr. Tinney and Mr. Matthews, for the Sons of the Clergy, cited *Sibley v. Perry* (7).

Mr. Randall, for the Haberdashers' Company, cited *Swift v. Swift* (8).

Mr. Wray, Mr. Spence, Mr. G. Russell, and Mr. Rudall, for other parties.

Mr. Pemberton, in reply.

June 27.

THE MASTER OF THE ROLLS :

This cause was instituted for the purpose of carrying into execution the trusts of the wills of Thomas Mendham and of his daughter Sybilla Carter, and the question reserved, arising upon the construction of the will of Thomas Mendham is, whether certain limitations therein contained are void for remoteness.

At the date of his will the testator, Thomas Mendham, had a wife Elizabeth and a daughter Sybilla. (His Lordship stated the limitation of the first moiety.)

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The clause thus stated is a distinct gift to the issue of his daughter, of a moiety of the residuary estate after the deaths of the wife and daughter; and I am of opinion, that the use which the testator has made of the words "only one child" and "such one child" shows that by the word "issue" in this clause he meant "children," and that the gift is of a moiety to the children of Sybilla, and in default of such children to the nephews and nieces,

(1) 1 Doug. 251.

(2) 1 R. R. 675 (3 T. R. 143).

(3) 41 R. R. 125 (3 My. & K. 560).

(4) 45 R. R. 234 (3 My. & Cr. 127).

(5) 35 R. R. 132 (5 Sim. 171).

(6) 1 P. Wms. 563.

(7) 6 R. R. 183 (7 Ves. 522).

(8) 42 R. R. 145 (8 Sim. 168).

and consequently that the gift over is good ; and this construction appears to me to be strengthened by other expressions which are used in the same clause.

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The testator having thus disposed of one moiety, expresses himself as follows : “ And as to the other moiety or half-part of the said residue of my estate (after the decease of my said wife and my daughter, Sybilla, without issue), I give and devise the same to the same trustees, to permit and suffer Thomas Newson Mendham to take and receive the interest and dividends thereof for his life, in lieu of the dividends before given to him ; ” and after his decease to certain charities therein named.

This last moiety being given after the decease of Sybilla without issue, the gift over, *primâ facie*, is too remote ; and the question is, whether there is any thing in this will to prevent the adoption of that construction. The testator was contemplating the time of his daughter's death : upon that event, he directed one moiety of his residuary estate to be severed from the other, and he disposed of the two moieties by distinct clauses in his will ; in one he made a distinct gift to the issue of his daughter, in terms from which it is to be collected, that he meant a gift to her children, and in effect, makes a gift over upon her death without children ; in the other he makes no distinct gift to the issue or the children of *his daughter, but makes a gift over on the death of his daughter without issue ; and it is argued, that the testator must have intended a gift of the second moiety to the children of his daughter, and if that construction cannot be maintained, still that the gift over of both moieties must have been intended to take effect on the same event, and that the word “ issue ” must have the same meaning in both clauses.

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It is certainly difficult to suppose that the testator can have really meant that, which appears to be the legal import and effect of the words of his will, or that he can have intended to use the word “ issue,” in different senses in the two clauses ; but as he has in one case made a distinct gift to the issue, and in the other he has not,—as in the clause containing the gift to issue, he has in the immediate context, used words which explain the word to mean children, in the other he has not,—as in the last clause there is not, between the death of the daughter, and the limitation over, any prior limitation, upon the failure of which the limitation over is to take effect, it appears to me, that I cannot upon any safe principles imply the gift to issue or children where it is omitted, or give to the word “ issue,” without an explanatory context, or any reference

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to a prior limitation, the same effect as is or might be given to it when accompanied by an explanatory context, or preceded by a prior limitation, the objects of which might qualify its general meaning.

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The word "issue" may, and does often mean children, and more than children. The testator in one place accompanies the use of the word by expressions, which signify that on that occasion he means children only; but it does not follow, that in another place where the word is not accompanied by such expressions, the *same limited meaning is intended; and in this clause, and with reference to this half of the residue, there is no prior limitation in favour of particular objects, beyond whom the meaning of the word might be held not properly to extend.

And on the whole I think that the gift over in the second clause is too remote, and cannot take effect as to any part; if it were good as to the purely personal property, it could not in favour of the charities be good as to the real estate or chattels real.

1840.
June 1.

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THE SOCIETY FOR THE ILLUSTRATION OF PRACTICAL KNOWLEDGE v. ABBOTT AND OTHERS (1).

(2 Beav. 559—571; S. C. 9 L. J. (N. S.) Ch. 307; 4 Jur. 453.)

Four projectors of a public Company obtained a charter, by which they, and all persons who might become subscribers, were incorporated. The capital was declared to be 20,000*l.*, which was to be divided into 400 shares. Before any other subscribers had joined, the four proprietors, of common assent, divided the 400 shares amongst themselves, accounting to the corporation (as was alleged) for 12,000*l.* and not 20,000*l.* They afterwards disposed of the shares. A bill being subsequently filed by the corporation against the projectors, impeaching the transaction, and to compel them to pay the full consideration: Held, that though at the time they were the only persons interested in the Company, yet it was not competent for them (2) to take the shares without paying the full consideration.

On a bill by an incorporated Company against the four projectors of it, to compel them to account to the Company for the value of shares which they had appropriated to themselves, without, as was alleged, having paid the full consideration: Held, that the individual shareholders need not be made parties.

Distinction between a corporation and the aggregate of the members forming such a corporation.

THIS suit was instituted in the name of the Society for the Illustration and Encouragement of Practical Science (an incor-

(1) *In re British Seamless Paper Box Company* (1881) 17 Ch. D. 467, 50 L. J. Ch. 497, 44 L. T. 498.

As to the issue at a discount of

shares of companies registered under the Companies Acts, see now the Companies Act, 1900, s. 8.—F. P.

porated Company) against P. H. Abbott, J. S. Brickwood, J. Shaw, and Anne C. Watson the widow and personal representative of Ralph Watson.

The bill in effect stated, that previous to 1832, Abbott, Brickwood, Shaw, and Watson (deceased) projected *the formation of a Company for the public exhibition of a collection of scientific works and specimens of new inventions and improvements, and they agreed to enter into partnership for that purpose, and to invite other persons to join them.

That, in 1832, they contracted for the lease of the Adelaide Gallery, purchased models, &c., and shortly afterwards opened it for public exhibition. That shortly afterwards, but previously to 1834, Telford and Giles agreed to become partners and take some shares, if they could be secured from liability beyond the amount of their several interests therein ; and for limiting the liability of subscribers to the undertaking, Abbott, Brickwood, Shaw, Watson, Telford, and Giles obtained a charter of incorporation, dated the 13th of October, 1834, whereby, after reciting that these six gentlemen had, on behalf of themselves and others, humbly represented to his Majesty that they, together with several other persons, being desirous of forming a society to be called "The Society for the Illustration and Encouragement of Practical Science," had subscribed considerable sums of money, and had erected a gallery for the publication of discoveries and inventions in science and arts, these six gentlemen, together with such other persons as had become, or should at any time thereafter become, subscribers to the capital or stock thereafter mentioned, were incorporated under the name aforesaid, with perpetual succession and a common seal; and it was thereby declared, that the capital of the society should be the sum of 20,000*l.*, divided into 400 shares of 50*l.* each, and the charter provided for general meetings, and declared that the majority of proprietors present at any such general or special meeting, should finally determine upon all resolutions relating to the affairs and government of the said society ; and it directed *that Telford, Abbott, Brickwood, Shaw, Watson, and Giles should be the first managers of the society ; it provided for the election of future and additional managers ; and the councils, of not less than three managers, had power to direct and manage the affairs of the society, conformably to the rules and bye-laws, and to enter into contracts, and execute assignments, &c. and do all other acts to which the corporate seal was required to be affixed, and generally

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to act in the management of the society and affairs thereof, "which said matters and things should be as binding upon the said society as if the same were done by the whole corporation."

At the time of granting the charter, Abbott, Brickwood, Shaw, and Watson were the only persons who then held any shares in the society; but Telford and Giles had promised to take five shares each if the charter was granted. That soon after the granting of the charter, Abbott, Brickwood, Shaw, and Watson caused to be prepared 400 shares of 50*l.* each, amounting together to 20,000*l.*; and they agreed to appropriate the whole number equally among themselves, and to resell the same or so many thereof as they might think proper, for their own private benefit, charging themselves with the whole capital of 20,000*l.* directed by the said charter to be subscribed by the proprietors of the said society; and they further resolved, as four of the managers of the said society appointed by the charter, to adopt, for and on behalf of the society, the purchases by them previously made, and the other proceedings taken in the establishment of the gallery and exhibition therein-before mentioned, and to take credit in account with the society, for the capital sum by them alleged to have been invested in making such purchases, and in establishing such gallery or exhibition, and in procuring the *incorporation of the society; and they resolved to represent the capital sum, so by them alleged to have been invested, as amounting to 16,000*l.*; and they paid and deposited the sum of 4,000*l.*, and no more, into the hands of the bankers of the society, which two sums of 16,000*l.* and 4,000*l.* made together the sum of 20,000*l.*, the capital or joint stock of the society.

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That from the incorporation of the society until February, 1835, Abbott, Brickwood, and Shaw, together with Watson, down to his death, managed all the affairs of the society in a private manner, without any interference on the part of Telford or Giles, or any other person. That Telford died soon after the charter of incorporation had been granted, and soon after, Abbott, Brickwood, Shaw, and Watson transferred to Telford's executors five shares in the society for 250*l.*, and also transferred other 5 shares to Giles for a like sum, which two sums of 250*l.* they appropriated to their own use, and they also sold other shares to other parties, so that the whole number of shares which were sold before February, 1835, was 160, and they appropriated all the money received for these shares to their own use. That previously to February, 1835, Watson died, and his widow, the defendant, Anne C. Watson, was

the executrix of his will, and that Abbott, Brickwood, and Shaw appropriated to themselves all Watson's shares, on account of a debt which they alleged to be due to them from him. That in February, 1835, Abbott, Brickwood, and Shaw entered in the books of the society 35 shares in Abbott's name, 5 in the name of Abbott's wife, 35 in Brickwood's name, and 5 in the name of his wife, and 20 in Shaw's name, and 160 in the names of different purchasers, and the remaining 140 in the joint names of Abbott, Brickwood, and Shaw.

That the first council of the managers was held on the 23rd of January, 1835, at which Abbott, Brickwood, Shaw, and Giles were present, when the seal of the society was affixed to a lease, by which the Adelaide Gallery was demised to the society for ninety years from Christmas, 1833, at the rent, for the first year, of 765*l.*, and for the subsequent years of 898*l.* That the first general meeting of the society was held on the 18th of February, 1835, when Abbott, Brickwood, Shaw, and eight other proprietors of shares attended; that Brickwood acted as chairman, and read the charter to the meeting, and then entered into a statement of the circumstances and prospects of the society, and informed the meeting that the full amount of the capital of 20,000*l.* directed by the charter had been raised and subscribed by the original proprietors, and that of such capital, part, amounting to 16,000*l.*, had been invested in the purchase of the furniture, fixtures, models, philosophical apparatus, and other effects, whereof an inventory was then produced, and in defraying the other necessary expenses incident to the first establishment of the institution, and in procuring the incorporation thereof, and that the remainder of such capital, amounting to 4,000*l.*, was then deposited in money in the hands of the bankers of the society. That the meeting placed implicit confidence upon the honour and integrity of Brickwood and his coadjutors, and did in fact believe that the *bonâ fide* cost of establishing the society and furnishing the gallery was 16,000*l.*; and that upon the faith of such representations, the members of the society, at the first general meeting, passed a resolution, declaring their approbation of the statement made to them by Brickwood. That at this first meeting, seven additional managers were appointed, who occasionally attended the meetings of the council, but the three first-named defendants *took the chief part in the management of the concern.

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That from 1835 to 1838 the affairs of the society appeared to be

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in a flourishing condition, and considerable dividends were declared, but that in the latter part of 1838 it was discovered that the whole profits of the society had been exhausted in making former dividends, without providing for current expenses, and that the reserved capital of 4,000*l.* deposited in the hands of the bankers had been improperly resorted to, and was much reduced in amount; and that the whole sum of money expended by Abbott, Brickwood, Shaw, and Watson, in the purchase of fixtures, furniture, instruments, and apparatus, and otherwise in making the aforesaid gallery, and establishing the society, including all allowances proper to be made in calculating the same, did not exceed the sum of 8,000*l.*; and that at the respective times of granting the charter of incorporation, and of the first general meeting of the society, the 'entire value of the furniture, fixtures, models, philosophical apparatus, and other effects, whereof an inventory was produced at the first general meeting, did not exceed the sum of 3,500*l.*, and that Abbott, Brickwood, and Shaw, in representing the furniture, fixtures, models, philosophical apparatus and other effects, together with the leases and adaptation of the premises and establishment of the institution, as having cost the full amount of 16,000*l.*, were guilty of a false and fraudulent representation; and that under cover of such misrepresentation, they had withheld and converted to their own use the sum of 8,000*l.* or upwards, part of the capital of the society.

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The bill prayed that an account might be taken of the number of shares in the capital of the society, which, *after the incorporation of the society, were appropriated by or to Abbott, Brickwood, Shaw, and Ralph Watson respectively: and of the amount of capital which, at the time of the appropriation of such respective shares and in consideration thereof, ought to have been paid or subscribed by the said last-named defendants and Ralph Watson respectively to the funds of the society: and of all sums of money paid, subscribed, or otherwise satisfied to the society by the said last-named defendants and Ralph Watson respectively, in respect of the capital sum due from them or any of them upon their respective shares; and that in taking such accounts, credit might be allowed to Abbott, Brickwood, and Shaw respectively, and to the estate of Ralph Watson, for all sums of money by them respectively properly advanced or expended on behalf of the society before the incorporation thereof; and that it might be declared that the society was not bound by the resolution of the general meeting in

February, 1835; and that Abbott, Brickwood, and Shaw might respectively be decreed to pay to the plaintiffs, what, upon taking such accounts, should be found due to the plaintiffs from the said last-named defendants respectively, and that Mrs. Watson might be decreed to pay to the plaintiffs, out of the personal estate of Watson, what, upon taking such accounts, should be found to be due to the plaintiffs from the estate of Watson.

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To this bill Abbott and Shaw demurred for want of equity, and also for want of parties, on the ground that the wives of Abbott and Brickwood, and the other original shareholders in the bill mentioned were necessary parties.

Mr. Tinney, Mr. Bethell, Mr. Walker, and Mr. Hetherington, in support of the demurrer :

By the arrangement *complained of, no injury was done to the parties who now seek redress; the act now questioned was done by all the members of the corporation, who had then full power of dealing with the corporate property as they pleased. The injury done by themselves as individuals was sustained by themselves as forming the corporation. Telford and Giles are not alleged to make any complaint and are not parties; besides this, the act was afterwards confirmed by the council of managers and by the general meeting. *Hichens v. Congreve* (1) differs materially from the present case; there the directors sold land to the Company at a higher price than they had given for it, and they were compelled to account for the difference between the two sums; there, the directors were trustees for their co-proprietors: but in this case they were responsible only to themselves, and they exonerated themselves from any liability which they had subjected themselves to; the parties interested in having an account taken are the other shareholders, and they are not before the Court. If the four originators of the society are accountable, it must be on the ground of mis-representation, and not on account of the division of the shares among themselves; the individuals, therefore, who were deceived, and not the corporation, are the proper parties to apply to the Court for relief; at all events, they are necessary parties to the suit.

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Mr. Pemberton, Mr. G. Richards, and Mr. R. Palmer, in support of the bill :

The division of the shares was not an act of the corporation, but

(1) 32 B. R. 173 (4 Russ. 562; 4 Sim. 420).

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an act of the individual shareholders. The bill does not impeach that division, but seeks to have the arrangement completed by paying the full price.

All the shareholders are represented by the corporation, they are all before the Court, and therefore the objection for want of parties, is not valid ; they cited *The Charitable Corporation v. Sutton* (1).

THE MASTER OF THE ROLLS :

This bill alleges, that four persons, being at that time the managers and the only members of the corporation, purchased for themselves all the shares into which the property of the corporation was to be divided, without paying the just price for them ; and the bill which has been filed by the corporation prays, in substance, that an account may be taken of what they ought to have paid, and for payment of the amount. This I apprehend to be the substance of the bill, though it is complicated in its frame. Whether fraud has or has not been practised, is not now a matter for the consideration of the Court, the only question now being, whether upon the allegations of fraud which are contained in this bill, the plaintiffs are entitled to have an answer from the defendants. A great deal of confusion has almost unavoidably arisen in the course of the argument, by not distinguishing the corporation or corporate body from the individual persons, who at one time seem to have constituted not the corporation, but all the members of the corporation (2). Unless such a distinction be observed, it would be impossible to come to any thing like a satisfactory conclusion upon this occasion. The four gentlemen who have been mentioned seem to have been engaged in the meritorious speculation of collecting together objects of science for exhibition. They commenced it as a private speculation, but after they had proceeded for some time,

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they were desirous of *associating with them two other persons. These, however, objected to come into the concern, unless they were exonerated from any liability, beyond the amount for which they pledged themselves, by any subscription they might think fit to make. As this could only be done by a charter of incorporation, one was accordingly applied for and obtained, and it was certainly granted upon the supposition that a capital to the amount of 20,000*l.* was to be raised, and that the undertaking was to be carried on for the purposes stated ; it was upon this understanding

(1) 2 Atk. 400.

(2) See *Bligh v. Brent*, 47 R. R. 420
(2 Y. & C. 295).

that the peculiar privileges which belong to chartered corporations were granted. Now it is distinctly stated in this bill, that the only persons who were at that time interested, were the four persons named. That being so, it is alleged in argument, that they had the right to do what they pleased with respect to that which was to become the property of this corporation, that is, in respect of these shares; and that if, on the one hand, they had the power of incurring responsibility, they had, on the other hand, the power in that way of discharging themselves from it. I confess I cannot concur in that argument. They were then the only members of the corporation, and taking it for the present, that being such only members, they had a right to do what they pleased with the property of the corporation, without proceeding to the extent of destroying the corporation; yet had they a right to act in a manner totally inconsistent with this charter of incorporation, and at the same time continue to act as if the charter of incorporation were valid—to hold out to the world that it was valid, and to sell shares upon that supposition? I apprehend they were bound to look to the continuance of the corporation, and to the conditions and terms on which it was originally founded; and that, in continuing it, they could not discharge themselves from the liability of the conditions affecting the rights of all who might afterwards *become members of the corporation. A man with regard to his own estate may act as he pleases; he may, as it has been said in argument, take from one pocket and put into another: but that is not the case with these persons. They were the only managers and the only members of the corporation, and what is alleged upon this bill is, that they determined to become the owners of all the shares; their right to do so is not disputed by the plaintiffs, but what they say is this, “You might, if you pleased, have become the owners of all the 400 shares, but if the corporation was to continue, then you were bound to give to the corporation the value of those shares, or 20,000*l.*; but you have not done so.” This is the question to be determined in this cause. The defendants, on their part, say we have laid out money in the purchase of models, furniture, &c.: in the alteration of the premises: and in carrying on the undertaking, until we had established and made it very valuable; our outlay and expenses amounted to 16,000*l.*, we have added 4,000*l.*, and by delivering the models, &c. to the corporation, and by paying the 4,000*l.*, we have become the purchasers of 400 shares. If the facts were so, it is not disputed by the plaintiffs that the

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transaction was right, but the truth of that allegation cannot be brought into discussion upon this demurrer. The plaintiffs allege by the bill that the expenditure did not amount to the 16,000*l.*, and if not, the result simply is, that the amount of the expenditure, together with the 4,000*l.*, which was the whole consideration paid for the 400 shares, was much less than their value. It is distinctly stated by the bill that the four persons bought the whole 400 shares from the corporation: that they as individual members of the corporation acquired them, without, according to the allegation in this bill, having paid into the corporation fund the value of them.

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This transaction was effected amongst themselves very soon after the charter of incorporation was granted, and I do not find any body else acting on that occasion. There appears to be an entry of the agreement in the ledger, in which they expressly charge themselves with the sum of 20,000*l.*, and discharge themselves by the 16,000*l.* already expended and the 4,000*l.* paid by them into the bankers of the company. At the first council, held on the 23rd of January, 1835, and at the first general meeting, which took place on the 18th of February, 1835, they stated that they had paid 20,000*l.* for the shares in the same way, viz. 4,000*l.* in money and 16,000*l.* in expenditure. The bill, however, alleges that at the time that meeting took place, faith was given to these representations; they were considered to be entirely true, and every body, therefore, concurred in allowing the transaction to stand: that is, believing that the full consideration for the 400 shares had been paid, they consented to the matter proceeding upon that footing; but upon an investigation of the accounts and of these different matters, it afterwards appeared that the sum of 16,000*l.* had never been advanced in this form at all: that not more than 8,000*l.* had been advanced, and the other 8,000*l.*, had never been accounted for to the corporation at all. The question therefore is, whether, upon a bill containing these allegations, the plaintiffs have not a right to an answer? Whether there was such a fraud or not, I have not at present the means of knowing. I can conceive many ways in which the sum of 16,000*l.* might have been honestly and properly paid up, and for any thing I know to the contrary, that may really have been the case; but it does appear to me on the facts I have stated, that these defendants ought to answer this bill.

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It is to be observed that the transaction which is impeached, is a transaction between these parties as individual managers on the one hand, and the corporation on the other; and that no transaction as

between these parties as the owners of shares, and the persons who purchased from them is in any way in dispute in the present bill ; the latter are not therefore necessary parties to the suit.

An appeal was presented to the Lord Chancellor, but the case was afterwards compromised.

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WHITING v. FORCE (1).

(2 Beav. 571—574 ; S. C. 9 L. J. (N. S.) Ch. 345.)

1840.

June 2.

Rolls Court.

Lord
LANGDALE,
M.B.

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A testator gave his residuary estate to his wife for life, and to be divided amongst and paid to his children on the whole of them attaining twenty-one and not before, but the payment to be postponed till the death of their mother ; and he directed maintenance to be allowed them in the event of the wife's death while the children were under twenty-one. There was a gift over to the children of any child who should die before receiving his share, and the testator provided that in case any of his children should die without leaving issue, his share should go over to the survivors. A child attained twenty-one after the widow's decease, but died without issue before receiving her share : Held, that her representatives, and not the surviving children, were entitled to her share.

THE testator in this cause, by his will, dated in March, 1826, gave the residue of his estate to trustees, upon trust to invest the same, and pay the income to his wife for her life ; and he declared that it was his will that the estate should only be divided among his children on the whole of them attaining the age of twenty-one years, and not before that period ; and should the whole of his children attain the age of twenty-one years during the lifetime of their mother, then the payment of their respective shares should stand over until their mother's demise. He then gave directions for the maintenance and advancement of his *children in the event of the death of his wife before his children attained the age of twenty-one years. And on the death of his wife, and on the whole of his children attaining the age of twenty-one years, then he directed his executors to divide, pay, transfer, or assign the whole of his estate unto and among his children in equal shares. And in case any one of his children should die before receiving his or their share, then he directed the same to be paid to any child or children which he, she or they should leave behind them, so that such issue should receive their deceased parent's share ; provided always, that in case any of his said children should

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(1) *In re Luddy* (1883) 25 Ch. D. 394, *Bunnister* (1885) 30 Ch. D. 512, 54 L. J., 53 L. J. Ch. 21, 49 L. T. 706 ; *Wilks v.* Ch. 1139, 53 L. T. 247.

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die without leaving lawful issue, then he directed that such parts or shares of him, her or them, should go and accrue to the survivors or the issue of those surviving, and to be equally divided amongst such surviving children, or their issue, in the same manner as the share or shares of those dying were in his will before declared to be payable.

The testator died in April, 1826, leaving his wife and three children surviving him; the widow afterwards died, and Rosetta, the youngest child, attained twenty-one in October, 1839, after the widow's death; in December, 1839, Rosetta intermarried with Mr. Beecher, and died in January, 1840, without issue; her husband took out letters of administration to her estate.

Previously to her death a suit had been instituted by the three children of the testator against the surviving executor, and the fund had been paid into Court: but Rosetta had not, at her death, received any part of her share.

[*573] A supplemental bill having been filed on her death, the cause came on for hearing, and the question was *whether, by the death of Rosetta without issue, before payment of her share, it went over to the two other children.

Mr. Pemberton and *Mr. Bacon*, for the plaintiffs, the two other children, cited *Hutcheon v. Mannington* (1), *Gaskell v. Harman* (2).

Mr. Kindersley and *Mr. Hardy* for *Mr. Beecher*, *Mr. Spence* and *Mr. Wright*, for the executor; and *Mr. Craig*, for a purchaser, were not called on by

THE MASTER OF THE ROLLS, who said:

It appears to me that the gift over to the other children does not take effect in this case.

The testator intended, and has distinctly directed, his estate to be divided amongst all his children on the whole of them attaining twenty-one, and not before that period. Under that direction the duty of the trustees to pay, and the right of the legatees to receive, accrued at the moment when the testator's youngest child attained twenty-one. He then goes on to say, that "in case any one of his children should die before receiving his or her share," then it was to go to the children which such child should leave behind, and if

(1) 2 R. R. 115 (1 Ves. Jr. 366).

(2) 8 R. R. 224 (11 Ves. 489).

there should be none, it was to go over to the surviving children of the testator. The word "receive" must be construed with its co-relative "pay;" and therefore the right to receive and the duty to pay occurred at the very same time; I cannot imagine, then, that it was the intention of the testator, if one of his children having become entitled to receive a share of this property asked for payment, but happened to die without receiving it, that this accident *was to alter the destination of the fund. I am of opinion, therefore, that the gift over did not take effect.

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THE ATTORNEY-GENERAL v. KELL.

(2 Beav. 575—580; S. C. 9 L. J. (N. S.) Ch. 389.)

1840.
June 10.

Rolls Court.

Lord
LANGDALE,
M.R.

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A fund was raised by voluntary subscription by the inhabitants of Lewes and its neighbourhood, and applied in the purchase of premises to be used as a fever hospital, and the trusts were declared accordingly. In 1808 the trustees, under a resolution of the inhabitants at a general meeting, sold the hospital, and lent the produce to the commissioners of lighting and paving on the security of the rates. Neither the principal nor interest having ever been repaid: Held, upon an information by the *Attorney-General*, that this was a charitable foundation: that a breach of trust had been committed: and that the money ought now to be repaid by the commissioners out of the rates, though by the Act empowering the commissioners to raise money on the rates one twentieth of the principal was to be paid off annually.

In the year 1742, there being no hospital in the town of Lewes, the inhabitants and the gentry of the neighbourhood raised by subscription the sum of 421*l.* 10*s.* for the purpose of establishing one. 200*l.*, part of the sum so raised, was applied in the purchase of premises, which, on the 1st of November, 1742, were conveyed to twenty-four trustees, "in trust that when any person or persons should at any time thereafter happen to fall sick of the small-pox or any other infectious distemper within the limits of the borough of Lewes, or within the liberty of the castle thereof, or in any of those houses without the limits of the borough of Lewes aforesaid, called the Spittal houses, lying in the parish of St. Ann, or in any of the houses which lie in the said parish eastward of said Spittal houses towards the said borough, that then the said messuage and premises should be used and employed for an hospital or pest-house to receive such person so infected as should be nominated and appointed by the said trustees, or the majority of them, together with the constables of said borough for the time being:" the remainder of the money was employed in converting the premises

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into a pest-house, and in providing necessary materials and furniture.

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In 1792 the premises, being considered useless as an hospital, as well as unsafe, from the neighbourhood which in the course of years had grown up round it, *ceased to be so applied, and the furniture which had belonged to it was sold by the then constable of the town, and the premises were let to the parish officers.

In 1808, under a resolution at a general meeting of the inhabitants of Lewes, the property was sold to the parish of St. Ann for 450*l.* and was conveyed by the trustees to Turner, a trustee for the parish of St. Ann. The purchase-money was thereupon paid to the commissioners of lighting, paving, and cleansing the town, who under the powers contained in a local Act of Parliament, executed a security on the rates to three persons as trustees for the sum of 450*l.*, with interest. Turner, about the same time, conveyed the premises to the churchwardens and overseers of the parish for a term of 1,000 years, and covenanted to convey the inheritance and levy a fine thereof to them. By a declaration of trust made between the surviving trustees of the first part, the constable of Lewes of the second part, Turner of the third part, the mortgagees of the rates of the fourth part, and the churchwardens and overseers of the fifth part; it was declared that the trustees of the 450*l.* should stand possessed thereof and of the interest, to dispose as well of the said interest as principal money in such manner as should be required by the said trustees and constables for the time being, or a majority of them, in purchasing, erecting, or hiring, and maintaining a proper place of reception for persons labouring under the small-pox or any other infectious distemper, as was limited, expressed, and declared in the said indenture of 1st November, 1742, or for such other purposes as in the judgment of the said last-mentioned trustees and constables for the time being, or a majority of them, might best contribute to guard against the introduction or spreading of such infectious distemper within the said *borough and parts adjoining. And, in the mean time, in trust to indemnify the parish officers of St. Ann, or the persons for the time being possessed of the said term of 1,000 years, from all disturbance in, or eviction from the possession of the said premises, and all claims in respect thereof out of the said sum, as the said trustees, constables, and churchwardens and overseers of St. Ann for the time being should direct.

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By the Paving Act in question (46 Geo. III. c. 43), the

commissioners were empowered to borrow not exceeding 2,100*l.* on the rates, and were to pay interest on the money, and one twentieth of the principal yearly. The first payment of which was to be made at the expiration of six months from the time of making each mortgage.

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No part of the 450*l.* or the interest had ever been paid. This information was filed against the clerks of the commissioners, the surviving trustees and the constables, praying an account of what was due upon the mortgage debt of 450*l.*, and for a declaration that the commissioners were bound to repay the same; and if they should not admit assets sufficient, then that they might be directed forthwith to take such steps as by the provisions of the Act were lawful and necessary for the purpose of raising a sufficient sum to repay said mortgage debt and interest, and for a scheme.

Mr. Pemberton and *Mr. Blunt*, in support of the information, contended that this was an established charity: that the inhabitants had no power of destroying, or of applying, for the benefit of the rate-payers of the town, that which was intended for persons afflicted with disease. That lapse of time was no bar to a charity, especially where, as here, the parties had all notice of the trust.

Mr. Renshaw for the trustees.

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Mr. Kindersley and *Mr. Alfrey*, for the commissioners, contended that this was not a charitable foundation, but a private and voluntary arrangement of the inhabitants, with which the *Attorney-General* had no right to interfere; and that the inhabitants had, if they chose to exercise it, the full control and right of varying the application. That the establishment having become unnecessary, and there being no funds to support it, it would be useless to re-establish it; that the intention was to benefit the town, and the hospital having for many years prior to 1806, by reason of the introduction of vaccination become useless, it was a proper application *cy-pres* of the fund to devote it to cleansing the town, and by increasing its salubrity, prevent the introduction of infectious diseases.

That the present rate-payers were not liable to pay that which ought to have been borne by the rate-payers of 1808, and that the Act of Parliament provided that one twentieth of the principal money borrowed was to be repaid every year. That there was no mode of enforcing the security, except by taking possession of the

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present rates and diverting them from the legitimate purpose for which they were raised.

They also contended that length of time was a bar to the relief.

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Mr. Pemberton, in reply, referred to the case of *Attorney-General v. Bovill* lately before the Court (1), in which the charity estates had been purchased with money raised by voluntary contributions amongst the *parishioners of St. Clement's Danes, yet it had been held that the parish had no right to divert the funds from their original destination.

THE MASTER OF THE ROLLS :

This is an information by the *Attorney-General* praying for relief in respect of an establishment called a charity. In 1742 there was a collection by voluntary subscription, by which means a sum of 450*l.* was raised, and a house was purchased and conveyed to trustees for the purposes stated. I can have no doubt that a charity was thereby established, and that the trustees had no right whatever to sell the property, or to place the produce in the hands of the commissioners to be applied by them to other purposes.

In 1792, it is said that there were no means of applying the premises according to the intention, and that there was then no want of any such institution, as by vaccination cases of small-pox had disappeared. It would be difficult to imagine that such was the case in 1792, or that at any time an hospital for infectious diseases would become useless. It is objected that the establishment is not endowed, and that there are therefore no means of supporting it: this is no argument against its being a charitable institution. Here are means of accommodation offered to those persons desirous of availing themselves of them; and if any difficulty occurs as to the application of the fund when recovered, a reference to the Master might be made to approve of a proper scheme.

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In 1792, the trustees concur in devoting the house to another purpose, and in 1808 they actually sell the property for 450*l.*, to persons who are not parties to the information, namely, the parish of St. Ann. The *parties seem to have been then desirous of applying the purchase-money in aid of the funds for paving, &c. and it ultimately found its way into the hands of the commissioners.

The purchasers conceiving that the title to the property might be impeached, procured an assignment of the rates to certain persons for securing the 450*l.*, and out of this fund they were to be indemnified. This transaction long after took place; it was discovered by the Charity Commissioners, and the *Attorney-General* files this information, whereby abandoning the charity lands, he follows the purchase-money in the hands of the commissioners of paving, and he produces in evidence against them the very deed by which they undertake out of the rates to repay the money.

It is said that there are no means of enforcing this demand, because the Act of Parliament directs monies borrowed to be repaid within twenty years.

I think, notwithstanding this, that the *Attorney-General* is entitled to the relief he asks, and that if the hospital is not wanted, and as it is represented, is useless, then a reference must be made to the Master to approve of a scheme for the application of the fund.

The amount of what is due must be ascertained; as to the mode of raising it, if a difficulty should occur, an application to the Queen's Bench may possibly become necessary.

It must be declared that this is a charity trust, and that the 450*l.* and interest, with the *Attorney-General's* costs, ought to be raised out of the rates (1).

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CANE v. MARTIN (2).

(2 Beav. 584—586; S. C. 4 Jur. 500.)

After demurrer allowed, the plaintiff's solicitor refused to proceed until payment of his bill: Held, that he was bound to deliver over the papers to the new solicitor of the plaintiff on the usual undertaking, as to lien and redelivery, but that the party ought, under the circumstances, to undertake to prosecute the suit with due diligence.

1840.
June 16.
Rolls Court.
Lord
LANGDALE,
M.R.
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MR. E. had been employed as the solicitor of the plaintiff, and a demurrer, filed by the defendants, to the bill had been allowed on merits. It was stated that the plaintiff had been advised by his counsel not to prosecute the suit further. Mr. E. declined to act further for the plaintiff until payment of his bill of costs; Mr. B. had subsequently consented to act in the suit for the plaintiff.

(1) The cause stood over, in order that some proposal might be made by the commissioners as to raising the money.

(2) *In re Faithfull* (1868) L. R. 6 Eq. 325, 18 L. T. 502.

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The plaintiff presented this petition, praying that Mr. E. might deliver up the papers in the cause to the new solicitor, without prejudice to any lien for costs, Mr. B. undertaking to return them after the hearing.

Mr. E. did not object to any inspection of the papers.

Mr. Renshaw for the petition cited *Heslop v. Metcalfe* (1), as a direct authority for the application, and *Colegrave v. Manley* (2).

Mr. Elderton argued that *Heslop v. Metcalfe* was not consistent with the former authorities. That here the suit was such as rendered it impossible that it could be successfully prosecuted; that the undertaking to return the papers after the hearing would be ineffectual, as the hearing would probably be indefinitely postponed; and thus the solicitor would be wholly deprived of the papers and of his lien on them. That Mr. B. should therefore undertake to prosecute the suit with due diligence.

Mr. Renshaw, in reply.

THE MASTER OF THE ROLLS :

In all cases of this description there are two questions of inconvenience; first, on the solicitor who has prosecuted the suit at a great expense, if the papers are taken from him before his bill is satisfied; and secondly, on the client whose course to the attainment of justice is obstructed by the retainer of his papers. The LORD CHANCELLOR, after consideration, has decided the proper course to be to deliver over the papers without prejudice and on a certain undertaking. I cannot, therefore, now *consider whether the case of *Heslop v. Metcalfe* was founded on previous authorities; but it is an authority so far for the present application. This is not exactly like the other case: here the party has been advised by competent persons that the cause ought not to be prosecuted; on the other hand, the plaintiff, perhaps, has been advised by equally competent persons that it may be advantageously prosecuted. I think, under these circumstances, the plaintiff ought not to take the papers out of the hands of Mr. E. without an undertaking to prosecute the suit with due diligence. As the solicitor does not refuse the parties access to the papers, let the

(1) 45 R. R. 248 (3 My. & Cr. 183).

(2) 24 R. R. 83 (T. & R. 400).

petition stand over until the next day of petitions, the solicitor giving free access to the papers in the mean while, in order that the parties may determine whether they will give the undertaking.

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EXTRACT FROM ORDER.—F. B. (the new solicitor) “undertaking to prosecute this cause with all due diligence,” and that the documents &c. delivered to him under this order shall be received without prejudice to any right of lien, and “that they shall be returned undefaced within ten days after the hearing of this cause, or after he shall at any time cease or decline diligently to prosecute the suit.” His Lordship doth order the delivery over of the papers &c. in or connected with this cause to F. B.

IN THE QUEEN'S BENCH.

1839.
April 16.

[3]

REG. v. THE LONDON AND SOUTHAMPTON
RAILWAY COMPANY (1).

(10 Adol. & Ellis, 3—10; S. C. 2 P. & D. 243; 8 L. J. (N. S.) Q. B. 820;
1 Rail. Cas. 717.)

The London and Southampton Railway Act (4 & 5 Will. IV. c. lxxxviii.) provides that all tenants from year to year shall deliver up possession to the Company at the expiration of six calendar months next after notice, whether such notice be given with reference to the commencement of the tenancy or not, and whether before or after the purchase of the lands by the Company; or at such time after the expiration of the notice as they shall be required; and that where any such tenant shall be required to give up possession before the expiration of his term or interest, the Company shall make compensation for the value of his unexpired term or interest. On 10th January the Company gave six months' notice under the Act to a tenant from year to year, whose holding began at Christmas: after the expiration of the notice, the tenant, who had refused to quit without compensation, was told by the Company that possession would not be required till Christmas: the Company did not take a conveyance of the reversion till 25th August.

Held, that the tenant, who voluntarily continued to occupy as usual till Christmas, was in the same situation as if a regular landlord's notice had been originally given to him, and was therefore not entitled to compensation.

CHANNELL, in Michaelmas Term, 20th November, 1837, obtained a rule *nisi* for a *mandamus* to the above Company to issue a warrant to summon a jury for the purpose of assessing the sum to be paid to Messrs. Francis and Sons for the purchase of their interest in premises taken by the Company under their Act, 4 & 5 Will. IV. c. lxxxviii. (local and personal, public), and for compensation by reason of such taking.

Sect. 47 of that statute enacts, that "all tenants at will, lessees for a year, tenants from year to year, and other persons in possession of any lands which shall be intended to be taken or used for the purposes of this Act, and who shall have no greater interest in the lands than as tenants at will, or lessees for a year, or as tenants from year to year, shall respectively deliver up the possession of such lands to the said Company, or to such persons as they shall appoint to take possession of the same, at the expiration of six calendar months next after notice to that effect shall have been

(1) Compare *Cranwell v. Mayor, &c. of London* (Ex, Ch. 1870) L. R. 5 Ex. 284, 39 L. J. Ex. 193. It may be questioned whether this does not over-

rule the judgment in the above case. But there is a shade of difference observed upon in the later judgment. —R. C.

given by the said Company to such respective tenants or lessees or persons in possession, or left upon the said lands, whether *such notice be given with reference to the time of the commencement of such tenant's holding or not, and whether such notice be given before or after the said lands shall be purchased by the said Company; or at such time after the expiration of six calendar months from the giving or leaving of such notice, as they shall be respectively required," &c. On refusal, the Company is authorised to issue a precept to the sheriff to deliver possession. By sect. 48 it is enacted, that where any such tenant or lessee shall be required to deliver up the possession of lands so occupied by him before the expiration of his term or interest therein, the Company shall make or tender to him, before they issue their precept to the sheriff to give possession of the lands, compensation or satisfaction for the value of his unexpired term or interest therein, such compensation, &c., in case of difference, to be ascertained by a jury in the usual way.

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It appeared by the affidavits in support of the rule, that Messrs. Francis, marble merchants, had been tenants, for nearly twenty years, of the premises in question, under a tenancy from year to year, commencing at Christmas; that their landlord owned a large estate in the neighbourhood, including these premises, chiefly occupied by yearly tenants, and had never been known to remove a tenant who paid his rent regularly. Messrs. F. used the premises for carrying on their business, and had laid out large sums in improving them. On 10th January, 1837, the secretary of the Company signed and served the following notice upon Messrs. F. touching the said premises: "In pursuance of the provisions contained in an Act of Parliament passed" 4 & 5 Will. IV., "entitled An Act for making a Railway from London to Southampton, I do hereby, on *behalf of the London and Southampton Railway Company, give you notice that all that piece or parcel of ground, and all those several messuages" &c. (describing the property in question), situate, &c., distinguished by the No. 6 in the map &c., "and now in your occupation, will be wanted and required for the purposes of the said Act; and I hereby, on behalf of the said Company, give you notice to deliver up the possession thereof to the said Company, or to such persons as they shall appoint to take possession of the same, at the expiration of six calendar months next after this notice; and I further give you notice on behalf of the said Company, that the said Company are willing to give you compensation

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for any unexpired term or interest you may have in the said premises at the end of six calendar months from this notice ; and that if for the space of ten days next after service hereof you shall neglect or refuse to treat, or shall not agree with the said Company for the amount of such compensation," (notice that in that event the Company would cause a jury to be summoned to assess compensation). After the expiration of six months from the delivery of this notice, the secretary informed Messrs. Francis that the Company were then the landlords of the premises, and that Messrs. F. were trespassers on account of their neglect to remove pursuant to the notice, and demanded possession, and required them to give an immediate answer whether they would remove or not. Messrs. F. stated their willingness to remove, on being paid compensation for the same, which the Company declined to do.

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The affidavits on the part of the Company stated, that at the time of serving the above notice on the 10th of January, they and their agents believed that the tenancy *of Messrs. Francis was a yearly tenancy expiring at Michaelmas, and they accordingly notified to Messrs. F. that, although they had given a formal notice to quit at the end of six months, it was not their intention to disturb Messrs. F. in their possession until Michaelmas. The Company became the legal owners of the reversion by a conveyance on 25th August. On the 30th September possession was duly demanded on behalf of the Company ; but no compensation was offered, (although negotiations had been and still were pending between the agents of the parties on the amount thereof,) inasmuch as the Company were advised that none could of right be claimed, if possession was not demanded until the regular expiration of the tenancy. Messrs. F. refused to quit unless compensation was paid. It afterwards came to the knowledge of the Company's agents that the tenancy was one that would expire at Christmas, and not at Michaelmas ; whereupon Messrs. F. were informed that possession would not be required until Christmas in the same year. It was further alleged, that from the time of the notice in January, 1837, until the following Christmas, Messrs. Francis continued in possession of the premises, and carried on business there as usual, until they began to remove, a few days before Christmas ; that such removal would not have occasioned any greater loss or inconvenience to them than they would have suffered by removal under any other circumstances ; and that at the period of their applying

to this Court for a *mandamus* they had, in fact, suffered none whatever. In this Term (1)

Sir J. Campbell, Attorney-General, and *Hill*, showed cause :

Messrs. Francis are not entitled to compensation, unless the mere expectation of renewal is a sufficient title to it. The words of this Act are very different from those of the Hungerford Market Act, in which the prospect of renewal has been held to be such an interest as gave the party a claim to satisfaction: *Ex parte Farlow* (2) and *Rex v. The Hungerford Market Company, Ex parte Still* (3). If the Company had taken possession of the premises, or the tenants had offered to deliver them up in July at the expiration of the notice, the latter would have been entitled to compensation. But, in fact, they were in possession, and had suffered no injury in their business down to the day of applying for the rule. They remained in possession until the following Christmas, at which time it is admitted that an ordinary landlord's notice would have been sufficient to determine their interest.

(LITLEDAL, J.: Though allowed to remain, they might have been turned out at any time. This liability may have restricted them in their business.)

There is no suggestion of any such injury in the affidavits. It does not appear that they have even yet given up or offered possession. They cannot both enjoy and claim compensation for non-enjoyment. The application is to the discretion of the Court, who ought to be satisfied that some injury was sustained, which might have been estimated by a jury at the date of this motion, viz., 20th November, 1837. The words of the Liverpool and Manchester Railway Act (7 Geo. IV. c. xlix. local and personal, public) are almost exactly like the corresponding ones of the present Act, and the mere hope of renewal has been held to *be no ground for compensation under that Act: *Rex v. The Liverpool and Manchester Railway Company* (4).

J. Jervis and *Channell*, *contrà* :

The Company had it in their power either to proceed as they have done, availing themselves of a notice given under the authority

(1) Tuesday, April 16. Before Lord Denman, Ch. J., Littledale, Patteson, and Coleridge, JJ.

(2) 36 R. R. 580 (2 B. & Ad. 341).

(3) 4 B. & Ad. 592.

(4) 43 R. R. 454 (4 Ad. & El. 650).

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of the Act, in which case compensation is due ; or to give a regular notice, as landlords, to quit at Christmas, which has not been done. As landlords, they could not have compelled their tenants to quit till Christmas, 1838 ; the latter are therefore entitled to be indemnified for the loss of so much of their unexpired term or interest. At all events they have a right to compensation for the period between 10th July and Christmas, 1837. They refused to give up possession after the notice expired, because compensation was not tendered agreeably to sect. 48 ; and though it is true that the Company attempted to countermand their notice, and assumed the character of landlords after they had purchased the reversion, it has been decided in *Rex v. The Hungerford Market Company, Ex parte Davies* (1), and in a previous case there mentioned, that such notice cannot be retracted so as to deprive the tenant of his indemnity, otherwise the tenant might be left in uncertainty, and at the mercy of the Company, during the whole number of years allowed to them for the exercise of their compulsory right.

Cur. adr. vult.

LORD DENMAN, Ch. J. in the same Term (Wednesday, May 1), delivered judgment as follows :

[*9] This was a rule for a *mandamus*, on the part of *Messrs. Francis, to obtain compensation under the 47th and 48th sections of stat. 4 & 5 Will. IV. c. lxxxviii. establishing the Southampton Railway Company. The language of those sections is substantially the same as that of the Act establishing the Liverpool and Manchester Railway Company, and the case of *Rex v. The Liverpool and Manchester Railway Company* (2) is a strong authority upon the subject. In that case the claimants held under a lease for seven years, having a reasonable expectation of renewal, but no covenant or agreement to that effect : the Company gave a six months' notice under the Act, which expired at the same time as the term of seven years, and it was held, that the claimants had no right to any compensation.

Here the claimants were tenants from year to year commencing at Christmas. The Company, in January, 1837, gave a six months' notice under the Act, supposing, erroneously, that the claimants held from Michaelmas. On discovering the error, they gave notice that the premises would not be wanted till Christmas. The

(1) 38 R. R. 253 (4 B. & Ad. 327).

(2) 43 B. R. 454 (4 Ad. & El. 650).

claimants did not quit in July, nor indeed at Christmas. At the time of the notice in January, the Company had not purchased the landlord's interest, but they did so before July (1), and before they gave notice that the premises were not wanted till Christmas. Now, if the claimants had quitted in July, they would undoubtedly have been entitled to some compensation, but as they have chosen to hold over beyond Christmas, at which time they might have been compelled to quit by the *ordinary landlord's notice without compensation, it is said that they are not entitled to anything. On the other hand, it is contended that the tenancy has never been determined, because no regular landlord's notice was given; that the situation of the tenants was materially altered by the six months' notice given in January, and their possession rendered wholly uncertain from day to day after the expiration of those six months.

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We cannot think that the Act of Parliament requires two notices in the case of a tenancy from year to year; but the true construction is, that the Company might either give the ordinary landlord's notice ending with the current year of the tenancy, in which case no compensation would be due, or six months' notice under the Act, to be given at any time, in which case the tenant would be entitled to compensation for the value of the term between the expiration of the six months' notice and the time when a regular landlord's notice would have expired. But in order to entitle the tenant to such compensation, the premises must be given up. If, as in this case, the Company inform the tenant that he may hold them till the end of the current year, and he chooses so to do, the situation of the parties is the same as if a regular landlord's notice had been originally given, and the tenant is entitled to no compensation, because he has voluntarily retained the possession.

It makes no difference that the Company were not landlords when they gave the notice in January; that notice was undoubtedly meant to operate under the Act, and would have done so but for the subsequent conduct of the parties. Under these circumstances, we are of opinion that this rule must be discharged.

Rule discharged.

(1) It was stated in argument that the purchase was made between 10th January and 10th July; the conveyance was on 25th August. The fact,

that the claimants had not quitted at Christmas, did not appear by the affidavits, but was asserted in the course of argument.

1839.
April 18.

[27]

SUTTON AND OTHERS v. TATHAM.

(10 Adol. & Ellis, 27—30; S. C. 2 P. & D. 308; 8 L. J. (N. S.) Q. B. 210.)

A person employing a broker to sell shares, directed him, by mistake, to sell 250 shares, meaning fifty. The broker contracted with another broker on the Stock Exchange for the sale. The shareholder, on the next day, informed his broker of the mistake, and asked if the bargain could not be made void; the broker answered "No;" and the shareholder then said he must leave the matter in his hands to do the best he could. By the rules of the Stock Exchange, brokers, on sales of this description, do not name any principal, and, if the vendor is not prepared to complete his contract, the purchaser buys the requisite number of shares and the vendor is bound to make up the loss, if any, resulting from a difference in prices. The broker, being unable to complete his contract, paid such difference: Held, that for the difference so advanced, the shareholder was liable to the broker in *assumpsit* for money paid.

Per Lord DENMAN, Ch. J., and LITLEDALE, J.: A person who employs a broker on the Stock Exchange impliedly gives him authority to act in accordance with the rules there established, though the principal may himself be ignorant of the rules.

ASSUMPSIT for the work and labour &c. of plaintiffs done and bestowed by them as the brokers and agents of and for defendant on his retainer and at his request, and for commission and reward due from defendant to plaintiffs in respect thereof. Counts for money paid, and on an account stated. Plea, *non assumpsit*. On the trial before Lord Denman, Ch. J., at the sittings in London after last Hilary Term, the following facts appeared: The defendant had employed the plaintiffs as brokers, and had dealings with them in stock and shares for three or four years. On May 28th, 1838, he gave directions to the plaintiffs to sell for him 250 shares in the South Australian Company. They accordingly, on May 29th, sold 109 such shares to Wells, a broker, and advised defendant thereof by letter of that day; and on May 30th, they sold Wells 100 more such shares. On the same day the defendant came to the plaintiffs' counting-house, and said that there had been a mistake, and that he had intended only to sell fifty shares. He, in fact, had not the number sold by the plaintiffs. On the following day, one of the plaintiffs, Mr. Robert Sutton, had an interview with the defendant, when, as was stated in evidence, the latter said "he had got into a difficulty." Sutton said, "it was an unfortunate *mistake." Defendant asked if the bargain could not be made void? Sutton said "No." Defendant then said "he must leave the matter in their hands to do the best they could." Plaintiffs, on the 31st, applied to Wells to cancel the bargain, informing him

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of the mistake, but he declined, saying it was too late. The Stock Exchange is governed by rules of a committee, which are in print, and one of them is, that if the selling broker is not prepared to fulfil his contract, the purchaser may buy in shares to make up the deficiency, and charge the selling broker with any loss by difference of price. The reception of this rule in evidence was objected to, but the objection over-ruled. If the selling broker refuses to make up the difference, he is liable to be expelled the Stock Exchange. According to the usage, no principal is named by the broker on either side. The plaintiffs being unable to complete their contract, Wells bought in shares, according to the rule, on the best terms in his power, and there being a loss on the transaction, the plaintiffs repaid this, and broker's commission for the purchase, to Wells, on his demand. The present action was brought to recover this amount, and the plaintiff's brokerage on the sale of the shares to Wells. *Sir F. Pollock*, for the defendant, cited *Child v. Morley* (1), as showing that a broker, having voluntarily made a payment in obedience to the rules of the Stock Exchange, could not hold his principal, a stranger to those rules, responsible for the amount. Lord DENMAN, Ch. J. thought that in this case the principal was answerable, but, as to the loss on the second purchase, he left it to the jury to say whether the bargain for that purchase was made *within a reasonable time after the mistake was discovered; intimating his own opinion that the plaintiffs were only entitled to recover the commission, inasmuch as they did not appear to have done the best in their power for the defendant as to the repurchase. Verdict for the plaintiffs for 52*l.* 5*s.*, the amount of the two commissions.

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TATHAM.

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Sir F. Pollock now moved for a new trial on the ground of misdirection :

The defendant must lose the commission on the sale to Wells, that sale having been the result of his own mistake. But the plaintiffs are not entitled to commission on the repurchase, if, by greater diligence, they could have procured the sale to be cancelled; and at all events they might have left the defendant, who was not amenable to the rules of the Stock Exchange, to adjust it for himself. If they have thought proper to comply with those rules, by which no principals are known, and brokers who have contracted to sell must, under certain penalties, deliver the amount contracted

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for, the defendant, who is not cognisant of the rules, ought not to bear the consequences of such compliance. The language of the Judges, particularly that of LAWRENCE, J., in *Child v. Morley* (1), is strongly in the defendant's favour.

(LORD DENMAN, Ch. J.: I think a person employing one who is notoriously a broker must be taken to authorise his acting in obedience to the rules of the Stock Exchange.

PATTESON, J.: Did the defendant desire to have the purchaser's name given to him?

LORD DENMAN, Ch. J. stated the evidence on this point, as above.)

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LITTLEDALE, J.:

A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed.

PATTESON and COLERIDGE, JJ. concurred.

Per CURIAM:

Rule refused.

1839.
April 19.
[30]

DRY v. MARY DAVY (2).

(10 Adol. & Ellis, 30—32; S. C. 2 P. & D. 249; 3 Jur. 315; 8 L. J. (N. S.) Q. B. 209.)

The following guarantee was given to the firm of M. and D., the actual members of which, at the time, were M., D., and N.: "G. C. is desirous of commencing business in your line, and wants the usual credit for six months; if you think well to supply him, I will be answerable for the amount of 100l."

Held, that on N. withdrawing from the firm (which continued under the names of M. and D.), the guarantee ceased; no intention appearing on the instrument that the responsibility should continue after any such change in the partnership.

ASSUMPSIT by the plaintiff as surviving partner of Charles Flower Mirfin, on a guarantee alleged to have been given to the plaintiff and Mirfin in his life-time. The defendant pleaded *non assumpsit*, and other pleas, not material here. On the trial before Lord Denman, Ch. J. at the sittings in Middlesex after last Term, it appeared that the guarantee declared upon was given to Mirfin

(1) 8 T. R. 610.

Act, 1890 (53 & 54 Vict. c. 39), s. 18.

(2) Confirmed by the Partnership —R. C.

and the plaintiff, then carrying on business in partnership as linen-drapers, by the defendant, and was as follows.

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v.
DAVY.

“Messrs. MIRFIN and DRY.

“GENTLEMEN,—My son Mr. G. C. Davy of” &c. “is desirous of commencing business in your line, and wants the usual credit for four or six months. If you think well to supply him, I will be answerable for the amount of 100*l.* I am, &c.

“28th June, 1886.

“MARY DAVY.”

At this time the firm of Mirfin and Dry consisted of those persons, and a third partner named Nicol. Credit was given to G. C. Davy, as desired. Nicol afterwards left the firm, and Mirfin and Dry continued the business. The goods, in respect of which they now sought to enforce the guarantee, were supplied by them to G. C. Davy after Nicol left the partnership. The LORD CHIEF JUSTICE was of opinion that, on Nicol's departure from the firm, the guarantee was at an end, and he directed a nonsuit (1).

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Sir J. Campbell, Attorney-General, now moved for a new trial :

This was a continuing guarantee to the firm of Mirfin and Dry. Being given to the firm, it was not extinguished by Nicol's retiring; and he could not be joined as a plaintiff, because the credit was given after he withdrew, and therefore he never had a right of action. *Pease v. Hirst* (2) shows that the guarantee was available to the firm, notwithstanding the departure of Nicol. BAYLEY, J. says there, that “A surety bond or instrument may be so framed as to comprehend future as well as present partners.”

(LORD DENMAN, Ch. J. : There the instrument was a promissory note, payable to “Pease, Harrison & Co., or order.”)

It certainly makes a distinction, that the guarantee there was given by a negotiable instrument.

LORD DENMAN, Ch. J. :

The language of BAYLEY, J. in *Pease v. Hirst* (2), makes it an authority against these *plaintiffs. He says : “Here by the form of the instrument none of the parties have placed themselves in the situation of sureties. They appear on the face of the instrument

[*32]

(1) It was also contended that the guarantee, in its terms, was not a continuing one, to which point *Nicholson v. Paget*, 1 Cr. & M. 48, and *Melville*

v. Hayden, 22 R. R. 495 (3 B. & Ald. 593), were cited.

(2) 34 R. R. 343 (10 B. & C. 122).

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v.
DAVY.

to be principals, and not to have confined their liability to the then existing partners in the banking-house, for the note is made payable to them or order." And, consequently, after a change in the firm, it was held that the original payees might sue upon the note (which had not been indorsed) for the benefit of the new partners. Here the instrument was of a totally different description, and the change of partnership made an end of the guarantee.

LITLEDALE, J. :

The circumstance of a particular person being in the firm, may be the inducement for giving and continuing the guarantee: and there is nothing in the instrument in question to show that that was not the case here.

PATTESON, J. concurred.

COLERIDGE, J. :

Either the guarantee was at an end, or Nicol should have joined in the action.

Rule refused.

1839.
April 26.

[42]

WENTWORTH AND ANOTHER v. COCK, ADMINISTRATOR OF S. COCK (1).

(10 Adol. & Ellis, 42—46; S. C. 2 P. & D. 251; 3 Jur. 340; 8 L. J. (N. S.) Q. B. 230.)

Plaintiffs entered into an agreement with C. to supply him with a certain quantity of slate immediately; with a certain other quantity monthly, at a fixed price; and with any further quantity, monthly, that C. might require. C. engaged to receive the slate, not exceeding 200 tons per month; and the agreement was to be in force till 1st January, 1838. Held, that plaintiffs might sue the administrator of C. for refusing to receive slate sent, in pursuance of the contract, after C.'s death and before the 1st January, 1838.

ACTION of assumpsit commenced 16th June, 1837. The declaration stated an agreement in October, 1836, between plaintiffs and intestate, that plaintiffs should supply to intestate a certain quantity of slate block monthly, to be delivered in London at a specified price; that they should also supply to him, immediately, from 100 to 130 tons of blocks at the same price but of different dimensions, and any further quantity, monthly, that the intestate might require.

(1) Cited and applied by Lord (1867) L. R. 3 Eq. 98, 101, 36 L. J. ROMILLY, M. R. in *Cooper v. Jarman* Ch. 85, 86.—R. C.

The intestate engaged to receive any quantity of the above-mentioned blocks not exceeding 200 tons per month. The plaintiffs, during their contract with the intestate, were not to supply any other person with blocks of the same description, except for use in the plaintiff's neighbourhood; and the contract was to be in force till 1st January, 1838, unless cancelled by mutual consent: the terms of payment to be by bill at four months, and discount for ready money. The declaration averred mutual promises, and the readiness of plaintiffs to supply the intestate during his life, and the defendant, administrator as aforesaid, since intestate's death, with blocks of the description and at the price agreed upon; and that plaintiffs, after the decease of intestate, had sent to London divers tons of such blocks in pursuance of the agreement, and were ready and offered to deliver them to defendant as in the agreement mentioned, and were ready and willing to prepare *and deliver the residue; but that defendant did not nor would accept the slate blocks so sent to London and offered to him, or any part thereof, nor pay to plaintiffs the price thereof, though often requested; whereby plaintiffs lost the benefit of the agreement. Plea, that after making the agreement and promise, and before any breach thereof, by the intestate, he died. Verification.

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v.
COCK.

[*43]

Demurrer and joinder.

Warren, for the plaintiffs:

The question is, whether this is a personal contract which expired with the intestate, or one which is obligatory on his representatives. There is a distinction in this respect between acts which do, and acts which do not, require the personal skill of the party in order to execute them. It is only in the former class of cases that the contract is held to be extinguished by the death of the contracting party. There are cases in which contracts even of a personal nature have been adjudged to be obligatory on the executor. Thus an action lies against an executor on an obligation or covenant to instruct an apprentice in his trade, "though it sounds as a personal act:" Com. Dig., Administration (B 14), referring to *Walker v. Hull* (1), where it was said by the Court, on a motion to arrest judgment, that the master's covenant obliged his executors also, "and they ought to see the apprentice taught his trade, and if they are not of the same trade, they ought to assign him to another

(1) 1 Lev. 177.

WENTWORTH ^{r.} who is of the trade, so that he may be taught according to the
 COCK. covenant." This is a far stronger *case than the present. The
 [*44] same principle, viz., that an executor is liable on his testator's
 promise, not only to pay a debt certain, but also to do a collateral
 act which is uncertain, and rests only in damages, is laid down in
 Com. Dig. (under the head just cited): *Sanders v. Esterby* (1),
Berisford v. Woodroff (2), and in Sheppard's Touchstone, 482. In
Hyde v. The Dean and Canons of Windsor (3) it is said "a covenant
 lies against an executor in every case, although he be not named :
 unless it be such a covenant as is to be performed by the person of
 the testator, which they cannot perform." In all these cases, the
 executor is liable though not named: *Hambly v. Trott* (4), *Hyde v.*
Skinner (5). A building contract survives the death of the parties ;
 per COKE, Ch. J. in *Quick v. Ludborrow* (6). The distinction between
 the contracts of the testator which are extinguished by his death,
 and those which are not, is well put in Pothier on Obligations (7),
 part 3, ch. 7, art. 3. "Il y a aussi quelques dettes qui s'éteignent
 par la mort du débiteur. Telles sont celles qui ont pour objet
 quelque fait personnel au débiteur. . . . Hors le cas des faits per-
 sonnels, celui qui a promis de faire quelque chose, et qui est mort
 sans l'avoir fait, quoiqu'il n'ait pas été mis en demeure de le faire,
 transmet son obligation à ses héritiers, qui sont obligés de faire ce
 que le défunt s'étoit obligé de faire." The same principle is adopted
 by Cod. Justinian. Lib. 8, tit. 37, De contrahendâ et committendâ
 stipulatione: s. 15. "Si *quis spoponderit," &c. The general
 [*45] rule is thus laid down in 3 Bac. Ab. 535, Executors and Adminis-
 trators (P) (7th ed.): "It is clearly agreed, that executors and
 administrators, standing in the place of those whom they repre-
 sent, shall be answerable for all their debts, covenants, &c. as far
 as they have assets, and that the testator's covenants shall extend
 to them, though not expressly mentioned." In *Siboni v. Kirk-*
man (8) PARKE, B. says, "Executors are responsible on all the
 contracts of the testator broken in his lifetime, and there is only
 one exception with regard to their liability for contracts broken
 after his death ; that is this, that they are not liable in those cases
 where personal skill or taste is required." The principles now

(1) Cro. Jac. 417.

(2) Cro. Jac. 404. S. C., as *Beris-*
ford v. Goodrouse, 1 Roll. Rep. 433
 (more fully).

(3) Cro. Eliz. 552.

(4) Cowp. 371.

(5) 2 P. Wms. 197.

(6) 3 Bulstr. 30.

(7) *Traité*, &c. de Droit Civil,
 tom. i. p. 343, ed. 2, 4to.

(8) 1 M. & W. 419.

relied upon are recognised in *Marshall v. Broadhurst* (1) and *WENTWORTH Corner v. Shew* (2).

W.
COCK.

Godson, contra :

This is a personal contract. The intestate was required not merely to pay money, but to exercise a discretion as to the quantity required. The decision in *Marshall v. Broadhurst* (1) shows that executors may enforce a building contract; but it does not follow that they are liable upon one. *Corner v. Shew* (2) proves that such a contract does not devolve on the executor. *Robson v. Drummond* (3) shows that even a contract to job a carriage is a personal one, and is confined to the original parties to it.

(PATTESON, J. : In that case there was an attempt to assign a contract, and to enforce it in the name of the assignee. There was, indeed, a case at Liverpool where a contract to *build a light-
[*46]
house was held to be personal ; but that was on the ground of its being a matter of personal skill and science.)

LORD DENMAN, Ch. J. :

There is nothing in the defence. The contract leaves no option to the intestate of refusing to take the slate delivered monthly in certain quantities and at fixed prices, or the quantity to be delivered immediately. As to the further quantity to be delivered if required, the defendant will probably not now require it. This is the only part of the contract on which the intestate could have exercised any choice. It is like any ordinary case of goods ordered by a testator, which the executor must receive and pay for.

LITLEDALE, J. :

No doubt the personal representatives are bound, although not named ; and they are bound to pay damages out of the assets, if they do not take the contract upon themselves.

PATTESON, J. concurred.

COLERIDGE, J. :

If the contract had been merely to supply what the intestate might require, a different question would have arisen.

Judgment for the plaintiffs.

(1) 1 Cr. & J. 403 ; 1 Tyr. 348.

(3) 36 B. R. 569 (2 B. & Ad. 303).

(2) 49 R. R. 632 (3 M. & W. 350).

1839.
April 26.

[47]

TURNER v. ROOKES.

(10 Adol. & Ellis, 47—49; S. C. 2 P. & D. 294; 8 L. J. (N. S.) Q. B. 211.)

If a husband, living separate from his wife, and allowing her a maintenance, uses such violence towards her that she is obliged to exhibit articles of the peace against him, she may employ an attorney for that purpose at his expense.

And if the attorney sues the husband for his costs, the Court will not enquire whether or not the wife could have paid them out of the maintenance, without resorting to the husband.

ASSUMPSIT for work and labour &c. as a solicitor; for money paid; and on an account stated. Plea, *non assumpsit*. On the trial before Maule, B., at the last Spring Assizes at Taunton, the facts appeared to be as follows: The defendant and his wife had been separated for seven years, she living upon a maintenance of 112*l.* per annum, which the defendant had secured to her by deed. The cause of separation did not appear. At the Bath Quarter Sessions, April, 1838, she exhibited articles of the peace against the defendant, charging him with having used threats and personal violence towards her, of which evidence was given at the present trial. The defendant was bound in recognizances to keep the peace; and the plaintiff, who had acted in the proceedings as Mrs. Rookes's attorney, brought this action for the amount of his bill of costs. The defendant's counsel objected that, on this case, it did not appear that the wife had any implied authority from the husband to contract the debt; and he contended that the plaintiff should be nonsuited. The learned Judge refused to nonsuit, and stated his opinion to be, that if the wife had such reason to apprehend violence as made it necessary for her to exhibit articles of the peace, she was authorised to employ an attorney for that purpose: and in summing up he left it to the jury to consider, first, whether Mrs. Rookes had reasonable ground for seeking protection by articles of the peace; and, secondly, whether she had sufficient pecuniary means of obtaining *such protection without resorting to her husband. The jury found a verdict for the plaintiff.

[*48]

Crowder, on a former day of the Term (1), moved for a new trial on the ground of misdirection:

Assuming that articles of the peace were necessary for the wife's protection, it ought to have been shown that the separation between

(1) April 19th. Before Lord Denman, Ch. J., Littledale, Patteson, and Coleridge, JJ.

these parties had resulted from the husband's misconduct, or had taken place under such other circumstances as would legally authorise her to contract debts with which he should be chargeable. *Mainwaring v. Leslie* (1) and *Hindley v. The Marquis of Westmeath* (2) show the rule on this subject where the wife has become indebted for goods, and this case falls within the same principle. The jury's attention was not called to the necessity of proof respecting the circumstances of the separation. And the learned Judge left a question of law to them, in asking them whether the wife had reasonable ground for exhibiting articles of the peace. And further, in putting the question, whether she had means of obtaining protection without resorting to her husband, he should have pointed out to the jury that she had a maintenance allowed, and should at least have given them some rule by which to decide whether it was or was not sufficient for such a purpose as this.

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v.
BOOKER.

(LORD DENMAN, Ch. J.: I do not see that the separate maintenance has any thing to do with the question. She has that for other purposes: this cannot have been contemplated in making the allowance. The defendant *was bound to protect her, I should think, though they were living apart.

[*49]

LITLEDALE, J.: I think so too.)

The COURT took time to confer with MAULE, B.

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

On referring to the notes of the evidence there appears sufficient to show that the wife was in personal danger which warranted her exhibiting articles of the peace. Then the question is, whether the defendant was liable for the costs, it appearing that he allowed his wife a separate maintenance. There was some discussion as to the sufficiency of the allowance, but we need not go into that. The defendant was proved to have himself committed violence against his wife, and he cannot avail himself of the maintenance to exempt him from the charges incurred by his own violent conduct. There will therefore be no rule.

Rule refused (3).

(1) 31 B. B. 691 (2 Car. & P. 507; M. & M. 18).

(3) See *Grindell v. Godmond*, 44 R. B. 573 (5 Ad. & El. 755).

(2) 30 B. B. 290 (6 B. & C. 200).

1839.
April 26.
 [50]

MATTOCK, EXECUTOR OF SOUTHWOOD, *v.* KINGLAKE.

(10 Adol. & Ellis, 50—57; S. C. 2 P. & D. 343; 3 Jur. 699; 8 L. J. (N. S.) Q. B. 215.)

By articles under seal, A. agreed to sell and B. to purchase certain premises. B. therein covenanted to pay, on or before a fixed day, as the consideration of such sale and purchase, a certain sum, with interest to the time of the completion of the purchase, A. allowing thereout the same rate of interest for so much of the money as might be paid in the meanwhile; and B. agreed to pay for the conveyance and the stamp:

Held, that the conveyance was not a condition precedent to, or concurrent with, the payment, and that A. might therefore sue for the purchase-money and interest, without previously tendering a conveyance.

DEBT by the plaintiff as executor of one Southwood. The declaration stated that the defendant was seised in fee of certain premises by virtue of a bargain and sale enrolled, dated 19th February, 1822, by which the Bishop of Winchester had bargained and sold the same to Southwood in fee to such uses as he (Southwood) by deed or instrument in writing, with or without power of revocation and new appointment, sealed and delivered by him in the presence of, and attested by, one or more credible witness, should from time to time, or at any time, appoint of and concerning the same; and in default of such appointment to the use of defendant in fee, in trust for Southwood, his heirs, and assigns for ever. That, defendant being so seised, it was afterwards agreed by and between Southwood and defendant, at defendant's request, that Southwood should convey to defendant all his estate and interest in the premises; that thereupon by articles of agreement, sealed and delivered by Southwood in the presence of a credible witness, and made between Southwood and defendant, Southwood agreed to sell and defendant to purchase the said premises for the sum thereafter mentioned; and defendant thereby, for himself and his heirs, covenanted with Southwood, his heirs and assigns, to pay to him or them, on or before 19th February, 1825, as the consideration for such sale and purchase, the sum of 11,206*l.*, with interest at 5 per cent., payable half yearly, to the time of the completion of the purchase, Southwood allowing thereout *the same rate of interest for so much of the purchase-money as had been, or might be, paid to him in the meanwhile; and defendant thereby also agreed to pay for the conveyance and stamp duty. Averment, that Southwood, in his lifetime, was always ready and willing to perform his part of the agreement, and did in fact offer to execute a conveyance to defendant of all his estate and interest in the

premises, whereof defendant had notice; and that defendant had been ever since the agreement in possession of all the premises, and in receipt of the profits to his own use; yet defendant did not, nor would, pay or cause to be paid to Southwood, in his lifetime, the said sum and interest for the same on or before the said 19th February, 1825, although the purchase, by and through the default of defendant, had not been completed before that day; and although Southwood was living on and after that day; nor had defendant, since the death of Southwood, paid the same to plaintiff, executor as aforesaid: but on the contrary, a large sum, to wit &c. for principal and interest, parcel of the above sum, was still due and unpaid, the rest having been satisfied; whereby an action accrued, &c.

MATTOCK
v.
KINGLAKE.

Plea: that Southwood did not at any time tender to defendant any conveyance of the premises so agreed to be sold by him to defendant, or of any part thereof. Verification. General demurrer and joinder.

Bere, in support of the demurrer:

There is no obligation on the part of the vendor to tender a conveyance, where the expense of it and the stamp duty are to be paid by the purchaser. It is the purchaser's duty to prepare and tender it, even where the contract of sale is *silent as to the expense: 1 Sugd. Vendors &c. ch. 4, sec. 4 (1), where the authorities are collected. In *Price v. Williams* (2), a lessee, suing the party who had contracted to let, and who was to pay for the lease, was held not bound to aver a tender. Indeed, it is not clear that the vendor can recover the cost of the conveyance, if he incurs them without the direction of the vendee. At all events, the tender of a conveyance is not a condition precedent, where a time is fixed for payment of the purchase-money, and none for making the conveyance. *Pordage v. Cole* (3) is directly in point, and is not distinguishable from the present case. The rules for ascertaining the dependence or independence of covenants in a contract are all to be found in the note (4) (4) of Mr. Serjt. Williams on that case. The fact, that the defendant is admitted on the record to be already seised in fee of the legal estate, is alone enough to obviate the necessity of a tender, or, indeed, of any conveyance at all. The articles of agreement, executed in the manner set forth, operated as an execution of the power reserved to Southwood; so that the whole estate and interest, legal and equitable, was already in the defendant.

[*52]

(1) § 55, *et seq.* P. 374 &c. 10th ed.

(2) 1 M. & W. 6.

(3) 1 Saund. 319.

(4) 1 Wms. Saund. 320.

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Manning, contra :

[*53]

Although it is alleged in the declaration that the defendant was seised in fee in trust for Southwood, yet the declaration also sets out the conveyance under which the defendant is supposed to have become seised, and that conveyance is an indenture of bargain and sale, by which the premises were conveyed to Southwood and his heirs, to uses to be thereafter *appointed. A bargain and sale would at common law pass no estate to the bargainee, but in respect of the consideration they would create a use, and, from the moment of the execution of the indenture of bargain and sale, the bargainor would stand seised to the use of the bargainee. That use is now executed in the bargainee by the Statute of Uses ; but after the statute has once operated to transfer the seisin, it can go no further, and all subsequent uses are void at law, and are merely cognizable as trusts. Here, therefore, the use appointed to the defendant by Southwood, by the articles of agreement, took effect only as a trust, not executed by the Statute of Uses.

[*54]

But supposing the legal estate to have been vested in the defendant, there was an equitable interest in Southwood, which was the proper subject of a conveyance. It is true that for some purposes a bare contract is said to be an equitable conveyance ; but it cannot be contended that a simple contract between a cestui que trust and his trustee, accompanied with merely such formalities as will satisfy the Statute of Frauds, will enure as a perfect conveyance. It was never supposed that a mere contract of sale between trustee and cestui que trust required the *ad valorem* duty of a conveyance ; yet, according to the doctrine contended for on the other side, the contract, followed by the fact of payment of the purchase-money on the appointed day, would complete the defendant's legal and equitable title. It was never in contemplation that the defendant should rest satisfied with such an inferential conveyance ; this is evident from the stipulation respecting the costs of the conveyance and the stamp duty ; which stipulation would of itself be sufficient to entitle the defendant to call for a conveyance, even if the contract itself had conferred an *unexceptionable title. As to the argument drawn from the fixed day of payment, it is not denied that parties may contract for a conveyance to be executed on one day, and the purchase-money paid on a precedent day ; but the Courts will not put such an interpretation upon a contract, unless the intention is plain. In *Pordage v. Cole* (1), the words " the money to be paid

before Midsummer, 1668," stand unconnected with any mention of conveyance or consideration. Here several expressions indicate an intention to make the conveyance and the payment concurrent and mutually dependent acts. The 11,206*l.*, or the balance, is to be paid on the 19th February, 1825, "as the consideration of such sale." Now, though the words "shall give" "775*l.* for all his lands" occur in *Pordage v. Cole* (1), yet the words relied upon in that case (*viz.* "the money to be paid before Midsummer, 1668"), as making the engagement to pay unconditional, occur in a different part of the deed. Again, interest is to be paid with the principal "to the time of the completion of the purchase." Now the purchase (which means the acquisition of the land by the vendee), cannot be said to be complete until the land is conveyed. Unless, therefore, the two acts were intended to be concurrent, the purchase-money might be paid in February, 1823; and if, by death or incapacity of parties, the conveyance was delayed till 1833, the defendant might be called upon for ten years' interest on money which he had paid, and of which Southwood was, in respect of the same period, receiving interest from other sources. The circumstance of the provision for payment of the expenses of conveyance being coupled with stipulation for paying the money and *completing the purchase, is a further proof that the conveyance and payment of the purchase-money were to be contemporary. A bill in equity for a specific performance lies as well for vendor as vendee: *Gibson v. Patterson* (2), *Baxter v. Lewis* (3); yet such a bill would be absurd if the vendor might, at law, recover the amount of the purchase-money, although he had not conveyed, for the jurisdiction of equity proceeds on the ground that the plaintiff has no adequate remedy at law. If a vendee fail to pay the purchase-money on the stipulated day, the vendor may file a bill for a specific performance, or he may sue at law for the damage which he has sustained by reason of the breach of covenant, or of promise, on the part of the vendee; but if he choose to sue at law in a form of action in which he seeks to recover the price of the property sold, he must actually execute a conveyance, and tender it to the vendee: *Standley v. Hemmington* (4), *Heard v. Wadham* (5), *Goodisson v. Nunn* (6), *Glazebrook v. Woodrow* (7), *Pincke v. Curteis* (8).

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[*55]

- (1) 1 Saund. 319.
- (2) 1 Atk. 12.
- (3) Forrest, 61.
- (4) 6 Taunt. 561.

- (5) 1 East, 619.
- (6) 4 T. R. 761.
- (7) 4 R. R. 700 (8 T. R. 366).
- (8) 4 Br. C. C. 332.

MATTOCK LORD DENMAN, Ch. J.:

KINGLAKE.

None of the circumstances relied upon by *Mr. Manning* are sufficient to show that the acts of payment and conveyance here were to be concurrent, or to distinguish this case from *Pordage v. Cole* (1) and the authorities cited in the note to it. If, as is contended on the part of the plaintiff, the legal and equitable estates are now united in the defendant, he requires no remedy against the plaintiff which he has not already in his own hands. If not, we cannot *help him to a remedy which he has not secured for himself by his contract.

[*56]

LITLEDALE, J.:

A time being fixed for payment, and none for doing that which was the consideration for the payment, an action lies for the purchase-money without averring performance of the consideration. An action for not executing a conveyance of the premises might have been maintained by the defendant before the day of payment; and in such action no allegation of payment would have been necessary. The covenants are independent, and each party has relied upon his remedy by action against the other. The case, therefore, differs from *Callonel v. Briggs* (2), and from *Goodisson v. Nunn* (3) *Glazebrook v. Woodrow* (4), and other cases cited, where both acts were to be done at the same time, or on the same day.

PATTESON, J.:

Pordage v. Cole (1) is directly in point. We must over-rule it if we decide in favour of the defendant. There is no express provision that the conveyance shall be executed before payment, nor any reasonable intendment that it was to be necessarily precedent to, or concurrent with, it. The words "completion of the purchase," which furnish the only plausible argument in the defendant's favour, only mean payment of the rest of the purchase-money. On the day specified, the defendant was to pay all the principal sum that remained due with interest up to that time; but he might have prevented the further running of interest by payment at any time before that day, if he pleased.

[57]

COLERIDGE, J.:

We must collect the intention of the parties from the whole

(1) 1 Saund. 319.

(2) 1 Salk. 112.

(3) 4 T. R. 761.

(4) 4 R. R. 700 (8 T. R. 366).

instrument. It fixes with precision the time of payment, which is expressed to be the consideration of the sale and purchase, and contemplates the possible payment before that time. It is possible that "the completion of the purchase" may have the meaning attributed to it by *Mr. Manning*; but I see no good ground for this construction. The defendant might have paid all the money, and called for a conveyance immediately. The acts are clearly independent, within the rule correctly laid down by *Mr. Serjeant Williams* in the note to *Pordage v. Cole* (1).

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v.
KINGLAKE.

Judgment for the plaintiff.

STEAD v. DAWBER AND STEPHENSON (2).

1839.

(10 Adol. & Ellis, 57—66; S. C. 2 P. & D. 447; 9 L. J. (N. S.) Q. B. 101.)

[57]

Declaration, in assumpsit, stated that plaintiff agreed to buy, and defendant to sell, a cargo to be delivered "on the 20th to the 22nd instant," to be paid for by acceptance three months from delivery; and that afterwards, before the 22nd, plaintiff, at request of defendant, gave time for the delivery to the 24th; breach, that defendant, though requested (to wit, on 24th) to deliver, had not, on 24th or any other time, delivered; special damage by rise of price between the agreement and breach. Plea, that the giving of time was part of a contract for the sale of goods at the price of above 10*l.*; and that there was no part acceptance, or earnest, or note or memorandum in writing. Replication, that the giving of time was not part of the contract &c.

It appeared that there was a written contract, as stated in the declaration, for the delivery "on the 20th to the 22nd;" but, the 22nd falling on Sunday, plaintiff, at defendant's request, verbally agreed to enlarge the time to the 23rd or 24th. The price fluctuated between the time of the agreement and the 24th, being higher on the last day. It was understood that the enlargement of time would postpone the delivery of the three months' acceptance.

Held, that on these facts defendant, under stat. 29 Car. II. c. 3, s. 17 (3), was entitled to the verdict, the enlargement of time having materially varied the contract, substituting for it a new contract on a similar consideration, and not being merely a dispensation from performance on a particular day.

ASSUMPSIT. The declaration stated that the plaintiff heretofore, to wit, 10th May, 1836, at the special instance &c., bargained for and agreed to buy of the defendants, and defendants then bargained for and agreed to sell to plaintiff, a sloop-load of about

(1) 1 Wms. Saund. 320, note (4).

(2) Followed in *Marshall v. Lynn* (1840) 6 M. & W. 109. And see these cases reviewed by Lord COLERIDGE, Ch. J. in *Hickman v. Haynes* (1875) L. R. 10 C. P. 598, 603, 44 L. J. C. P.

358, 359 *et seq.*; and by BLACKBURN, J. in *Ogle v. Vane* (1867) L. R. 2 Q. B. 275, 282, 36 L. J. Q. B. 175 (affd. Ex. Ch. L. R. 3 Q. B. 272, 37 L. J. Q. B. 77).—R. C.

(3) See now the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4.—R. C.

STEAD
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DAWBHER.
[*58]

400 quarters of ground bones, of good merchantable quality, *at 16s. 6d. a quarter, free on board, to be delivered on the 20th to the 22nd then instant; payment by acceptance three months from delivery; that afterwards, and before the said 22nd day of May, to wit 17th May, plaintiff, at the special instance &c., gave time to defendants for the delivery of the said sloop-load of ground bones until the 24th day of the said month of May; and, although plaintiff hath always, from the time of making the said contract hitherto, been ready and willing to accept and receive from defendants the said sloop-load &c., and to pay for the same at the rate or price and in manner aforesaid, whereof defendants, during all the time aforesaid, had notice, and were, to wit on 24th May, requested by and on behalf of plaintiff to deliver to him the said sloop-load of ground bones, yet defendants, not regarding their said contract, but contriving &c., did not nor would, upon the said 24th day of May, or at any time or times whatsoever, deliver to plaintiff the said sloop-load &c., or any part thereof, but wholly refused &c.: whereby plaintiff hath wholly lost and been deprived of the advantage which he would have derived from the performance of the said contract, and hath lost and been deprived of profits which might, and otherwise would, have accrued to him from the delivery of the said sloop-load of ground bones, the price thereof having greatly risen, (to wit) to the extent of 1l. 4s. 6d. per quarter, between the making of the said agreement and the refusal of defendants to fulfil the same as aforesaid.

Pleas. 1. *Non assumpsit*. Issue thereon.

2. That plaintiff did not, at the special instance &c., give time &c., in manner and form &c.: conclusion to the country. Issue thereon.

[59]

3. That defendants had no notice that plaintiff was ready and willing to accept &c., in manner and form &c.: conclusion to the country. Issue thereon.

4. That the said giving of time for the delivery of the said sloop-load of ground bones, in the declaration mentioned, formed and was part and parcel of a contract between plaintiff and defendants for the sale of certain goods, (to wit) ground bones, for the price of upwards of 10l. sterling, by defendants to plaintiff, and that plaintiff did not accept any part of the said goods so sold and actually receive the same, nor did plaintiff give any thing in earnest to bind the said bargain or in part of payment, and that no note or memorandum in writing of the said bargain was made and signed

by defendants or either of them, or their agent or agents thereunto lawfully authorised: verification. Replication, that the said giving of time, &c. was not part of the contract between plaintiff and defendants for the sale of the said ground bones: conclusion to the country. Issue thereon.

STEAD
v.
DAWBER.

On the trial before Alderson, B., at the York Spring Assizes, 1837, the plaintiff put in the following written note, signed, on the day of the date, by the broker acting for the plaintiff.

“HULL, 10th May, 1836.

“Bought of Messrs. Dawber and Stephenson, for Mr. William Stead, of Borobridge, a sloop-load of about 400 quarters of ground bones of good merchantable quality, at 16s. 6d. a quarter, free on board, to be delivered on the 20th to the 22nd instant. Payment by acceptance at three months from delivery.

“JOSEPH DAWSON, Broker.”

It further appeared that on the 17th of May Dawson told the defendant Stephenson that the 22nd would fall on a Sunday, and asked him if he could deliver the bones on the 21st; to which Stephenson answered, “You had better say Monday or Tuesday;” and Dawson replied, “Monday or Tuesday.” The bones were not sent: the price was afterwards tendered, and refused by the defendants. The price of bones had risen to 21s. per quarter on the 24th May. Dawson stated in evidence that the time for the delivery of the bills would be enlarged to 24th May, by the time for delivering the goods being enlarged to that day.

[60]

The defendants' counsel contended that, the written contract having been varied by a verbal agreement, there was no complete written contract, under sect. 17 of the Statute of Frauds, upon which the plaintiff could recover: but the learned Judge, being of opinion that the effect of the enlargement of the time was, not to alter the contract, but only to dispense with its performance on the day first named, directed a verdict for the plaintiff, giving leave to move to enter a verdict for the defendants on the issues upon the first and fourth pleas. In Hilary Term, 1837, *Alexander* obtained a rule accordingly (1). In last Hilary Term (2),

Cresswell and *Martin* showed cause:

The alteration as to the time of delivery formed no part of the

(1) The rule was also for the reduction of damages, on grounds which became immaterial by the decision of the Court.

(2) January 21st, 1839. Before Lord Denman, Ch. J., Littledale, Williams, and Coleridge, JJ.

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C.
DAWBBER.
[*61]

contract as it was originally framed, nor did it vary that contract : it was merely a dispensation from performing part of its terms, which prevented the plaintiff from availing *himself of a breach of that part : there was, therefore, no necessity under stat. 29 Car. II. c. 3, s. 17, that any writing should be given, referring to this alteration. The same point was decided in *Cuff v. Penn* (1); and *Thresh v. Rake* (2) is to the same effect. *Goss v. Lord Nugent* (3) is inapplicable. There the substance of the written contract, to make a good title to fourteen lots, was varied by the new verbal agreement, which in effect substituted a contract to make a good title to thirteen only. If the contract here could not be altered by verbal agreement, then the verbal agreement forms no part of the contract, and then the issue on the fourth plea must be entered for the plaintiff; and also, on that supposition, the plea of *Non assumpsit* fails. Therefore, either there is no variation of the contract, or the contract, as varied, is good. But, in fact, the verbal agreement is no part of the contract set out in the declaration, which is merely framed on the original bought and sold note. This shows the distinction between the present case and *Goss v. Lord Nugent* (3), where the declaration treated the verbal contract as incorporated in the written one; and the Court said, "The written contract is not that which is sought to be enforced, it is a new contract which the parties have entered into." The breach here is that there was no delivery at all : if the defendant had proved a delivery on the day named in the verbal agreement, that would have been an answer to the breach in the nature of accord and satisfaction, not of a performance of the contract declared upon.

Alexander and Cowling, contra :

[*62]

The declaration shows, in the first instance, a contract binding the defendant *to deliver by the 22nd, and the plaintiff to give an acceptance at three months from the delivery : then it shows a substitution of a new day of delivery, and necessarily of a new time for the delivery of the acceptance, and for its maturity. That is a material variation of the contract ; and it takes place on a fresh consideration. In the case of sales of real property, under sect. 4 of the statute, time, at law, is of the essence of the contract ; and it is so in equity where the value of the thing sold may depend upon the time of performance, as here : 1 Sugd. Vend. and Purch. 402

(1) 14 R. R. 384 (1 M. & S. 21).

(8) 39 R. R. 392 (5 B. & Ad. 58).

(2) 1 Esp. 53.

(10th ed.), *Wilde v. Fort* (1), *Doloret v. Rothschild* (2), *Rothschild v. Hennings* (3).

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(LITTLEDALE, J., referred to *Shepherd v. Johnson* (4).)

Cuff v. Penn (5) can hardly be considered an authority now; and there a partial delivery, on a day later than that named in the contract, had been made and accepted; and Lord ELLENBOROUGH lays a stress on that fact. There, too, the action was for not accepting, and the difficulty did not exist which arises here from the difference of value at different times. In *Thresh v. Rake* (6) the agreement did not require a writing under the Statute of Frauds; and the COURT, in *Goss v. Lord Nugent* (7), distinguish, as to the effect of varying a written contract, between written contracts which might have been enforced if only verbal, and those under the Statute of Frauds. *Warren v. Stagg* (8), perhaps, is in favour of the plaintiff; but that case is inconsistent with later authorities. The cases under sect. 4 of the Statute of Frauds apply in *principle to sect. 17; and, upon sect. 4, it is now clear that a written contract, under the Statute of Frauds, cannot be varied by a verbal agreement: *Goss v. Lord Nugent* (7), *Harvey v. Grabham* (9), *Stowell v. Robinson* (10). Under sect. 17 the Courts have enforced the provisions of the Act very scrupulously, with a view to guard against the mischief which the statute meant to obviate, as in *Elmore v. Kingscote* (11). BAYLEY, J. appears to apply the same rules of interpretation to the two sections, in *Kenworthy v. Schofield* (12). *Greaves v. Ashlin* (13) and *Meres v. Ansell* (14) show the unwillingness of the Courts to vary or explain written contracts by oral testimony.

[*63]

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (May 7th), delivered the judgment of the COURT:

This was an action to recover damages for the non-delivery of a cargo of bones. By the sold note they were to be shipped on the

(1) 13 R. R. 616 (4 Taunt. 334).

(2) 24 R. R. 243 (1 Sim. & St. 590).

(3) 9 B. & C. 470; reversing the judgment of C. P. in *Hennings v. Rothschild*, 4 Bing. 315.

(4) 2 East, 211.

(5) 14 R. R. 384 (1 M. & S. 21).

(6) 1 Esp. 53.

(7) 39 R. R. 392 (5 B. & Ad. 58).

(8) Cited in *Littler v. Holland*, 3 T. R. 591.

(9) 44 R. R. 374 (5 Ad. & El. 61).

(10) 43 R. R. 861 (3 Bing. N. C. 928).

(11) 29 R. R. 341 (5 B. & C. 583).

(12) 26 R. R. 600 (2 B. & C. 945).

(13) 14 R. R. 771 (3 Camp. 426).

(14) 3 Wils. 275.

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v.
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[*64]

20th to the 22nd of May, and to be paid for by an acceptance at three months from the delivery. The 22nd happened to be on a Sunday; and, a conversation taking place between the defendant and the plaintiff's agent respecting this, upon the suggestion of the defendant the Monday or Tuesday immediately following were substituted as the days of delivery. The agent who proved this also stated that the time for giving the acceptance would, in consequence, be also proportionably enlarged. The main *question at the trial, and before us, was, whether this enlargement of the time was an alteration of the contract, or only a dispensation with its performance as to time. The declaration, after setting out the original contract, stated that the plaintiff, at the special instance of the defendants, gave them time for the delivery to the 24th May, and averred a demand on the 24th. The fourth plea alleged that this giving time was parcel of a contract within the Statute of Frauds; that there was no acceptance wholly or in part, or any earnest, or part payment; and that there was no note or memorandum in writing of it: and the replication traversed its being parcel of the contract.

[*65]

The principles on which this case must be decided are clear and admitted. The contract is a contract within the Statute of Frauds, and cannot be proved, as to any essential parcel of it, by merely oral testimony: for to allow such a contract to be proved partly by writing and partly by oral testimony would let in all the mischiefs which it was the object of the statute to exclude. Many cases were cited in the argument on both sides, the plaintiff's counsel relying chiefly on *Cuff v. Penn* (1), the defendants on *Goss v. Lord Nugent* (2), the decision in which it is certainly not easy to reconcile with that in the former. But it seems to us that we are mainly called on to decide a question of fact; what, namely, was the intention of the parties in the arrangement come to for substituting the 24th for the 22nd as the day of delivery; did they intend to substitute a new contract for the old one, the same in all other respects except those of the day of delivery and date of *the accepted bill, with the old one? Where the variation is so slight as in the present case, and the consequences so serious, the mind comes reluctantly to this conclusion; and this reluctance is increased by considering in how many instances of written contracts within the Statute of Frauds slight variations are made at the request of one or other of the parties, without the least idea, at the time, of defeating

(1) 14 R. R. 384 (1 M. & S. 21).

(2) 39 R. R. 392 (5 B. & Ad. 58).

the legal remedy or the original contract. But the same principle must be applied to the variation of a day and a week or a month; and it seems impossible to suppose that, when the plaintiff had agreed to substitute the 24th for the 22nd, either party imagined that an action could be brought for a non-delivery on the 22nd, or that a delivery on the 24th would not be a legal performance of the contract existing between them.

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It was urged by the plaintiff's counsel that the defendant's argument reduced him to an inconsistency; that he alleged, on the one hand, an alteration of the contract by parol, and yet, on the other, asserted that such alteration by parol could not be made. But this is, in truth, to confound the contract with the remedy upon it. Independently of the statute, there is nothing to prevent the total waiver, or the partial alteration, of a written contract not under seal by parol agreement; and, in contemplation of law, such a contract so altered subsists between these parties: but the statute intervenes, and, in the case of such a contract, takes away the remedy by action. It cannot be said that the time of delivery was not originally of the essence of this contract: the evidence shows that the value of the article was fluctuating; and the time of payment was to be calculated from the time of delivery. Where these circumstances exist, it *cannot in strict reasoning be argued, as was said by Lord ELLENBOROUGH in the case of *Cuff v. Penn* (1), that the contract remained, although there was an agreed substitution of other days than those originally specified for its performance. Nor does any difficulty arise from the want of consideration for the plaintiff's agreement to consent to the change of days; for the same consideration which existed for the old agreement is imported into the new agreement which is substituted for it.

[*66]

Putting, therefore, that construction on what passed between these parties which best effectuates their intention, and giving also full effect, as we ought, to the salutary provisions of the Statute of Frauds, we think that this giving of time was parcel of the contract, and, consequently, that the verdict on the fourth plea should be entered for the defendants.

Rule absolute accordingly (2).

(1) 14 B. R. 384 (1 M. & S. 21).

(2) See *Marshall v. Lynn*, 6 M. & W. 109).

1839.
April 29.
[66]

REG. v. THE MAYOR OF BRIDGNORTH.

(10 Adol. & Ellis, 66—71; S. C. 2 P. & D. 317; 3 Jur. 384; 8 L. J. (N. S.) M. C. 86.)

Payment of rates, to entitle a person to be put on the burgess list of a borough, under stat. 5 & 6 Will. IV. c. 76, s. 9(1), must be a payment by the party's own act. It is not sufficient that another person, without his authority, pays the rates for him.

Where a party, required by law to pronounce a decision on certain points, is brought before the Court by a motion impugning such decision, the general rule is, that he shall have costs if the application fails (2).

Per LITTLEDALE, J.: It is not regular to grant a single rule *nisi* for the issuing of several writs of *mandamus*.

A RULE *nisi* was obtained, in Michaelmas Term, 1837, for a *mandamus* to the Mayor of Bridgnorth to insert the several names of Job Allen and seventy-seven other persons named by the rule, in the burgess roll of the said borough. The names of these parties had *been inserted by the overseers in their lists made in September, 1837, but on the revision, in October, before the mayor and assessors, it was objected "that none of the said several parties had paid their respective rates themselves, but that the same had been paid for them by third parties." It was contended in answer, that, the rates having been paid, it was immaterial by whom or in what way the payment was made. The mayor and assessors held it necessary that all rates should be paid directly by the parties themselves, and therefore they expunged all the names. William Gittos, described as a law stationer, and stating himself to be an inhabitant householder and burgess of Bridgnorth, deposed, in support of the rule, that he did, on 31st August, 1837, pay to the overseers of the proper parishes respectively, all such rates as had become payable by the parties claiming enrolment, for the premises in respect of which they claimed, during 1837 and the two preceding years, except for the last six calendar months. And in a supplemental affidavit he stated that the rates "were all paid by him by the authority and with the knowledge and approbation of such several parties respectively."

The affidavits in opposition to the rule (which were numerous and went into much detail) stated that the rates had been paid, on the evening of August 31st, by persons who belonged to a political party in the borough, and, as was believed, for political

(1) Repealed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 5. But see s. 9 of same Act.

(2) Followed, on the point of costs, in *Reg. v. Mayor of Chipping Wycombe* (1875) 44 L. J. Q. B. 82, 84.—R. C.

purposes; that the payments had been made to the overseers of the respective parishes, in gross sums covering the amounts due from the parties named in certain lists, and whose claims were now in question; and that the overseers gave receipts for the gross sums to the parties paying, but none to the persons in whose names the payments *were made. The affidavits contained very full statements as to the condition in life of these parties, from which, and from their having been unable to pay rates when called upon during the three years in question, as well as from other circumstances, it was inferred that they would not and could not have paid the rates for themselves. Three of the parties deposed that they had not authorized such payments, and did not know of them till after they were made; and others were stated to have made admissions to the same effect.

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[*68]

R. V. Richards now showed cause, and contended that the parties claiming enrolment had not, under these circumstances, “paid” their rates, within the meaning of stat. 5 & 6 Will. IV. c. 76, s. 9.

Jervis, contra, was called upon by the COURT:

(LORD DENMAN, Ch. J.: We will not enquire into all the titles (1) on this rule.)

The general question on which they depend is, whether a party is entitled to be put upon the burgess-roll when another person has paid his rates for him. *Rex v. Lower Heyford* (2) has some bearing on this point.

(LORD DENMAN, Ch. J.: No: there it was considered by the Court that the rates were, in fact, paid by the party himself. The question here is, whether a voter can be put upon the list, without his knowledge, by another person.)

The words of the Act are, “unless he shall have paid . . . all such rates.” The payment on his account is his payment. If the statute had meant that this should not suffice, *words expressive of such intention would have been used. It may be said that such payments tend to bribery; but if that offence is committed, there is a remedy.

[*69]

(1) See *Reg. v. The Mayor of Harwich*, 47 R. R. 792 (8 Ad. & El. 919). Stat. 7 Will. IV. & 1 Vict. c. 78, s. 24. (2) 1 B. & Ad. 75.

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(COLERIDGE, J. : Persons are applied to for their rates, and do not pay : then some one comes, and in one evening pays the rates of all in a gross sum, without their knowledge.)

That statement applies only to some of the cases.

(LORD DENMAN, Ch. J. : Putting the most general case : if a man pays another's rates without authority from him, and as a volunteer, is that a payment by the party rated ?)

Construing terms strictly, the party does not pay ; but the Act does not require a payment with his own hand.

(COLERIDGE, J. : Why need those words be used, when the Act says " he shall have paid " ?)

The party does pay if he adopts the payment.

LORD DENMAN, Ch. J. :

We ought to promulgate our opinion on this subject without delay. If the practice described were to prevail, there would be great danger of the most enormous bribery. The statute, in requiring that the rates shall have been paid, contemplates some payment by the party's own act. The rule must be discharged.

LITLEDALE, PATTESON, and COLERIDGE, JJ., concurred.

R. V. Richards then applied for costs, and urged the expense which had been caused by including seventy-eight cases in one application.

Jervis, contra :

[*70] The point was new, and the want of authority, on which this Court has proceeded, was not the precise ground on which the mayor rejected the *names. No real disadvantage resulted from including all the cases in one rule.

LORD DENMAN, Ch. J. :

I say nothing as to the number of cases included in one rule. If the attention of the Court had been directed to the facts when the rule was moved for, probably it would not have been granted in that form. And if an application in each particular case was necessary, it would have been no better for the parties showing

cause. But where a person is bound by law to pronounce a decision, and that decision is disputed before us, and proves to be right, he is entitled to costs. That should be the general rule, though I do not say that circumstances may not take a case out of it. This rule must be discharged with costs.

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LITTLEDALE, J. :

The practice of moving for one or more writs of *mandamus* to be granted by the same rule should not be drawn into a precedent. It appears by a note in the possession of Mr. Robinson, that an application was made in 1793 for a rule to be so framed, but this Court said that they never heard of a rule to show cause why one *mandamus* or more should not issue (1). *I mean to say that this mode of drawing up a rule should not be considered as 'a matter of course. The rule here must be discharged with costs.

[*71]

PATTESON and COLERIDGE, JJ., concurred.

Rule discharged with costs.

DOE D. JOSHUA MAYHEW v. ASBY.

(10 Adol. & Ellis, 71—76; S. C. 2 P. & D. 302; 3 Jur. 438; 8 L. J. (N. S.) Q. B. 207.)

1839.
April 29.
[71]

In an action of ejectment on a forfeiture by breach of covenant to repair, the Court has no power to stay proceedings upon terms, if the lessor of the plaintiff does not consent (2).

KELLY, in Michaelmas Term, 1837, obtained a rule calling on the lessor of the plaintiff to show cause why all proceedings in this ejectment should not be stayed on payment of costs. The

(1) The reporters have been favoured with the note referred to, which is as follows :

Mr. Percival moved for and obtained a rule *nisi* for a *mandamus* to Samuel Hughes to take upon himself the office of one of the forty-eight men of Northampton, which was granted.

He then said there were four other persons in the same situation, and although he understood the Court last term to have decided that one *mandamus* could not comprise more than one person, yet he hoped the Court would permit these five men to be included in one rule *nisi*.

But the COURT said, they sometimes granted a rule to show cause why one or more information or informations should not be granted, but they never heard of a rule to show cause why one or more *mandamus* or *mandamuses* should not issue.

And accordingly five rules were taken.

Hilary Term, 1793.

(2) But see the provisions for relief against forfeiture contained in the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14. —R. C.

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action was brought by reversioner against termor to enforce a forfeiture by breach of a covenant to repair within three months after notice from the lessor or his assigns. Notice had been given to repair in the three months expiring June 18th, 1837; the repairs continuing undone, declarations in ejectment had been served on the 9th of August, and the defendant had entered into the usual consent rule. On November 23rd the present rule was obtained. A summons had been previously taken out for the same purpose, and the parties had attended before Littledale, J. at Chambers, November 17th, when the learned Judge held that he had no jurisdiction, and dismissed the summons. The affidavits in support of the rule stated that the repairs had, at the time of making this application, been done; that the defendant had proposed a meeting between his surveyor and the surveyor for the lessor of the plaintiff, and had offered to execute immediately, *under the direction of the latter, any alteration or amendment which he might propose, and likewise to pay the costs of the action as between attorney and client; but that these proposals had been declined. It was further stated that the defendant held for the residue of a term of sixty-one years, under a lease, dated September 1st, 1789, at a ground rent of 5*l.* per annum, and that the lease was beneficial and of considerable value. The affidavits in answer stated that several important repairs had not been done till after the action was brought; and that some trifling ones still remained to be performed as late as November 10th. *Doe d. De Rutzen v. Lewis* (1), and an unreported case of *Doe d. Gover v. Maberly* were cited in moving for the rule.

[* 72]

R. V. Richards and *Arnold* now showed cause :

This is an application which has never been made to a court of law; and even the courts of equity would not relieve in such a case. The rule in those courts is, that relief by injunction may be granted where the forfeiture attaches by nonpayment of a sum of money, the amount of which, with interest, may be calculated by the Court; but not where the breach of covenant consists in some other non-feasance, for which the reversioner must claim damages. This subject is very fully discussed, and the law laid down as now stated, in *Hill v. Barclay* (2). In *Bracebridge v. Buckley* (3), the Court of Exchequer refused equitable relief in

(1) 44 R. R. 414 (5 Ad. & El. 277). Ves. 56).

(2) 11 R. R. 147 (16 Ves. 402; 18 (3) 2 Price, 200.

a case of forfeiture by breach of a covenant to lay out 1,000*l.* in repairs within a given time; and in *White v. Warner* (1), where an injunction was moved for to restrain a landlord from suing *at law upon the breach of a covenant to keep premises insured against fire, and the case was represented as one of great hardship, Lord ELDON, L. C., said that the Court could not give relief against such a forfeiture upon the principle of compensation. The authorities on the subject are collected in Eden on Injunctions, p. 21 *et seq.* c. 2, and Comyn on the Law of Landlord and Tenant, p. 565 *et seq.* Book 4, c. 2, s. 3 (2). The only case in equity of any considerable weight, contradictory to those now cited, is *Sanders v. Pope* (3), where, on ejectment brought for a forfeiture by non-repair, Lord ERSKINE, L. C., granted relief on terms of compensation to the landlord. That case was much discussed in *Hill v. Barclay* (4), and had circumstances of its own, commented upon by Lord ELDON in *Hill v. Barclay* (5), which prevent it from being an authority in the present case (6). *Hack v. Leonard* (7), where relief is said to have been granted in a case of non-repair, is mentioned by Lord ELDON in *Hill v. Barclay* (8) as a loose note, and occurs in 9 Mod., a book of little authority.

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[*73]

(LITLEDALE, J.: The ninth Mod. is worse than the tenth.)

As to the supposition that clauses of re-entry are to be unfavourably looked upon, Lord TENTERDEN said in *Doe d. Davis v. Elsam* (9), "I do not think provisoes of this sort are to be construed with the strictness of conditions at common law. These are matters of contract between the parties, and should, in my opinion, be construed as other contracts. The parties agree to a tenancy on certain terms, and there is no hardship in binding them to those terms. In my view *of cases of this sort the provisoes ought to be construed according to fair and obvious construction, without favour to either side." And where the re-entry was for non-payment of rent, this Court, since stat. 4 Geo. II. c. 28, has refused between verdict and execution to stay proceedings in ejectment on payment of arrears and costs: *Doe d. Harris v. Masters* (10).

[*74]

(1) 2 Mer. 459.

(2) 2nd ed.

(3) 12 Ves. 282.

(4) 11 R. R. 147 (16 Ves. 402; 18 Ves. 56).

(5) 18 Ves. 59.

(6) See also note (83) to *Wadman v. Calcraft*, 10 Ves. 70, 2nd ed.

(7) 9 Mod. 91.

(8) 18 Ves. 61.

(9) 31 R. R. 729 (M. & M. 189).

(10) 26 R. R. 422 (2 B. & C. 490).

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r.
ABBY.

(LORD DENMAN, Ch. J. : In *Doe d. De Rutzen v. Lewis* (1), which was cited in moving, the reversioner had elected to do the repairs himself and hold the lessee responsible; he had therefore waived the forfeiture.)

The COURT then enquired of

Kelly, who supported the rule, if there were any authority for the interference now claimed. None has been found: but *Doe d. Gover v. Maberly*, a case determined by the Court of Common Pleas in Hilary Term, 1836, was relied upon at the time of moving for this rule. The case is not reported; but it appears that the action was brought upon a forfeiture incurred by non-repair and non-payment of rent, and that the Court, after judgment, ordered the defendant to be replaced in possession upon terms (2). That seems to be an authority for the present application.

[75] LORD DENMAN, Ch. J. :

I am satisfied that the Court of Common Pleas, in the case referred to, must have done no more than put the case in a train of arrangement. If the order had been made *in invitum* as to the landlord, the decision would probably have been reported. It is quite clear that we have not authority to make the order desired; to do so we ought to have more powers in other respects than we now possess. Supposing that we were willing to make such an order, could we direct an issue, to ascertain whether the repairs were well done or not?

LITLEDALE, J. :

We have no jurisdiction to make a rule absolute for staying these proceedings. All the authorities which have been cited, except one or two cases, show that such a power does not exist in the present instance.

(1) 44 R. R. 414 (5 Ad. & El. 277).

(2) By the papers in *Doe d. Gover* and another *v. Maberly*, it appears that the forfeiture was incurred by non-repair and non-payment of rent; ejectment was brought, issue joined, and notice of trial given; and the defendant then gave, and the lessor of the plaintiff accepted, a cognovit whereby the defendant agreed to withdraw his plea, and that unless he should pay, on or before December 28th, half the plaintiff's costs of the action and of withdrawing the record,

and the arrangement to compromise the same, &c. and should pay, on December 28th, half the rent due December 25th, and unless he should pay the remaining halves of the costs and rent on January 28th, and should repair the premises within four months, to the satisfaction of surveyors on each side, and unless defendant should within &c. appoint a surveyor for the purpose on his side, the lessor of the plaintiff was to be at liberty to issue a writ of possession, and also execution for the rent and costs, &c. Defendant

PATTESON, J. :

It is quite clear that we have no authority to make this rule absolute. From my note of the motion, I think that we granted the rule *nisi* under a mistaken impression of the facts. Supposing that we could interfere, it appears that there were repairs still undone when the action was brought.

COLERIDGE, J. :

The strongest way in which this case could be put for the tenant would be, to show that the affidavits disclose something which might have been an answer to the action. But they do not; and if they did, we could not try the question on affidavits.

Rule discharged.

WILSON v. RAY.

(10 Adol. & Ellis, 82—89; S. C. 2 P. & D. 253; 3 Jur. 384; 8 L. J. (N. S.) Q. B. 224.)

DOE d.
MAYHEW
v.
ASBY.
[76]

1839.
May 1.
[82]

Plaintiff being about to compound with his creditors, defendant, a creditor, refused to subscribe to the deed unless he were paid in full. Plaintiff, to obtain his signature, gave a bill, payable to the defendant's agent, for the difference between 20s. in the pound and 8s., the proportion compounded for. Defendant then signed the deed. Plaintiff did not honour the bill when due; but, on subsequent application, he paid it, some months after the dishonour, by two instalments, to the payee, and defendant received the money. The other creditors were paid according to the deed.

Held, that plaintiff could not recover back the amount paid to defendant above 8s. in the pound; for that the transaction had been closed by a voluntary payment with full knowledge of the facts, and ought not to be re-opened. And that it made no difference that the sum in question had not been recovered by action.

ASSUMPSIT (declaration of 22nd November, 1836) for money had and received, and on an account stated. Plea, *Non assumpsit*.

failed to perform the stipulated terms by December 28th, and the lessor of the plaintiff signed judgment on December 30th, and had possession delivered by the sheriff. The defendant applied, on summons before a Judge at Chambers, to have the judgment set aside on terms; the learned Judge thought he had no jurisdiction, but stayed proceedings for a time, that application might be made to the full Court. A rule *nisi* was obtained, January 13th, 1836, for setting aside the judgment, on affidavits alleging surprise, excusing the default, and

stating endeavours since made by defendant to complete the arrangement. They also showed that the defendant's lease was beneficial. By a rule of February 1st, 1836 (after hearing *Talfourd*, Serjt. for the plaintiff, and *Wilde*, Serjt. for the defendant), it was ordered, that on payment, within one week, of the debt secured by the cognovit, and costs (as specified in the rule), possession should be restored to the defendant; and that the judgment should stand as a security for the due performance of the repairs pursuant to the stipulations in the cognovit.

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RAY.

[*83]

On the trial before Lord Denman, Ch. J., at the sittings in London after Easter Term, 1837, it appeared that the plaintiff, on May 6th, 1833, compounded by deed with his creditors, one of whom was the present defendant. The defendant, when requested to subscribe the deed, had refused to do so unless he had 20s. in the pound; and the plaintiff, to *obtain his signature, accepted a bill of exchange drawn for this purpose by William Preston, the defendant's clerk, dated April 3rd, 1833, for the payment, at nine months, of 29l. 16s., the difference between 8s. and 20s. in the pound on the defendant's debt. The bill was not honoured when due, but, on subsequent application, the plaintiff paid the amount by two instalments, in February and May, 1834, to Preston, who placed the amount to the plaintiff's credit with the defendant. The 8s. in the pound was also paid (1). The plaintiff went on dealing with the defendant, and receiving goods from him, till the expiration of some months after the last instalment was paid. The defendant's counsel objected that, the payment having been voluntary, this action did not lie. The LORD CHIEF JUSTICE thought otherwise, but reserved leave to move to enter a nonsuit, and the plaintiff had a verdict for 29l. 16s.

[*84]

Kelly, in Trinity Term, 1837, moved for a rule to show cause why a nonsuit should not be entered. This action is grounded on a misconception of *Cockshott v. Bennett* (2) and other cases. It is true that if, in the present case, Ray had been holder of the bill and attempted to enforce payment of it by action, the circumstances under which it was extorted would have been a good defence; or if Ray had negotiated the bill to a *bonâ fide* holder, who had sued Wilson upon it, Wilson would have been without defence in such an action, but might have had his action over against Ray for the amount recovered against himself: *Smith v. Cuff* (3). *But here the bill had not been negotiated, and all the facts show that the payment was voluntary.

(LORD DENMAN, Ch. J.: The payee might at any time have placed the bill in the hands of a *bonâ fide* holder.)

It was still in his own hands when paid.

(1) It was stated in the course of discussion, when the after-mentioned rule was moved for, that all the

creditors were paid 8s. in the pound.

(2) 1 R. R. 617 (2 T. R. 763).

(3) 18 R. R. 340 (6 M. & S. 160).

(LORD DENMAN, Ch. J. : The fact was, that the plaintiff paid it rather than lose the credit which he had with Ray.)

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RAY.

The payment was made voluntarily and with knowledge of the facts; this case, therefore, falls within the principle laid down upon the subject in *Brisbane v. Dacres* (1).

(LORD DENMAN, Ch. J. : Nothing unlawful was done there; the parties only mistook their rights.)

In *Took v. Tuck* (2), where the defendant had compounded with his creditors (but it did not appear to what extent the composition had been carried into effect); and some time after that arrangement the defendant gave a bond for the whole amount of his debt to one of the creditors, the Court of Common Pleas held that such bond might be enforced, though it would have been otherwise if a bond or agreement to the same effect had been entered into before or at the time of the composition. Here the bill was given in pursuance of an original unlawful contract; the unlawfulness consisted in the undue pressure upon the debtor at the time of making the agreement; but the bill was paid under no unlawful pressure. Ray had not then the power, as a creditor, of enforcing any right against Wilson, or withholding any benefit from him; there was nothing to deter Wilson from availing himself of any protection the law might give him against Ray; therefore he made the payment voluntarily. He went on dealing with Ray for some time afterwards, and more *than two years passed before this action was commenced.

[*85]

(PATTESON, J., mentioned *Turner v. Hoole* (3).)

LORD KENYON held, in *Fulham v. Down* (4), “that where a voluntary payment was made of an illegal demand, the party knowing the demand to be illegal, without an immediate and urgent necessity, (or as expressed by Mr. Bearcroft, unless to redeem, or preserve your person or goods,) it is not the subject of an action for money had and received. The law, if so held, would subject all accounts and settlements between parties to revision.”

(PATTESON, J. : It does not appear that the payment in that case would have been in fraud of any third party.)

Here every creditor had been paid the amount of his composition.

(1) 14 R. R. 718 (5 Taunt. 143).

(3) Dowl. & Ry. N. P. 27.

(2) 4 Bing. 224. See *Tuck v. Tooke*

(4) 6 Esp. 26, n.

(S. C. in Error), 9 B. & C. 437.

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v.
RAY.

A rule *nisi* was granted. In this Term (April 30th)

Platt and R. V. Richards showed cause :

In the cases where it has been held that money voluntarily paid should be retained by the party receiving it, there was no fraud in the first instance. Here the bill was given to Ray in fraud of the other creditors ; no right could be acquired by such fraud, and the 29*l.* 16*s.* never ceased to be the money of Wilson. The payment here was not in any sense voluntary ; there appears to have been an urgency, the plaintiff paying an instalment before he had means to pay the whole. *The Duke de Cadaval v. Collins* (1) is, in principle, not distinguishable from this case.

[*86] (LORD DENMAN, Ch. J. : It would be more like if Ray had obtained the money when he executed the *deed. The question here is, why Wilson could not as well have resisted the demand upon the bill, as bring this action.)

In *The Duke de Cadaval v. Collins* (1) the LORD CHIEF JUSTICE, after stating the real question to be, whether the money is still the plaintiff's, adds, "How is it shown not to be so? Why, by striving to give effect to a fraud." "This case differs from all which have been cited as being otherwise decided: in none of those was the *bona fides* negatived." The same argument decides the present case. That the original transaction here was invalid, results from all the cases, beginning with *Cockshott v. Bennett* (2). In *Smith v. Cuff* (3) the plaintiff had paid the bill, in the hands of a *bonâ fide* holder, against whom he could have no defence ; and here, Wilson would have been similarly situated in an action brought by Preston, unless he could have identified Preston with Ray. *Turner v. Hoole* (4) decides the present case. There the defendant, having, with other creditors of the plaintiff, executed a composition deed, afterwards induced the plaintiff to accept bills to the full amount of his demand, which, though dated before, were drawn after the execution of the deed. The plaintiff paid the bills, after legal proceedings had been taken against him, and then brought an action of money had and received for the difference between what he had so paid and the composition secured by the deed ; and ABBOTT, Ch. J., held, at *Nisi Prius*, that the defendant was liable

(1) 43 R. R. 499 (4 Ad. & El. 858).

(2) 1 R. R. 617 (2 T. R. 763).

(3) 18 R. R. 340 (6 M. & S. 160).

(4) Dowl. & Ry. N. P. 27.

to refund that surplus, the transaction being a fraud, either upon the insolvent or upon the other creditors.

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(LORD DENMAN, *Ch. J. : I do not see how it was a fraud, being subsequent to the composition.)

[*87]

Turner v. Hoole (1) was relied upon as law by the Court of Common Pleas in *Alsager v. Spalding* (2). In *Coleman v. Waller* (3) the principle of *Cockshott v. Bennett* (4) was extended to the case where a creditor, as the consideration for his entering into a composition deed, obtained, not from the debtor but from a third person, security for his whole debt. *Hills v. Street* (5) is among the instances which show what may be considered compulsory payments, though not enforced by actual process of law. The Courts have always been anxious, in the cause of composition deeds, to preserve complete *bona fides* among the creditors.

Kelly, contra :

If there had appeared in this case either fraud, extortion, duress, or any kind of compulsion, the defendant could not retain the sum now claimed. And it may be admitted that if he had sued upon the bill he could not have recovered, the giving of it being an undue preference. The single authority of *Turner v. Hoole* (1) is against the defendant ; but that, if rightly reported, appears to be bad law ; and is contrary to all the other decisions.

(LORD DENMAN, Ch. J. : I feel no difficulty except from that case. Perhaps we had better take time to look into it. The antedating there seems to connect the transaction with some fraud.)

The plaintiff there should have resisted the proceedings commenced against him, But perhaps it may have been thought that, as the proceedings were upon bills *of exchange on which something (namely, the amount of the composition) was confessedly due, the insolvent was not called upon to defend, and might resort to his cross action.

[*88]

(PATTERSON, J. : He might have resisted *pro tanto*.)

(1) Dowl. & Ry. N. P. 27.

(4) 1 B. R. 617 (2 T. R. 763).

(2) 4 Bing. N. C. 407.

(5) 5 Bing. 37.

(3) 32 R. B. 799 (3 Y. & J. 212).

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The case stood over, and to-day,

LORD DENMAN, Ch. J. (after reading aloud the case of *Turner v. Hoole* (1), and consulting the other Judges) said :

This rule must be made absolute. The case which we wished to have more fully before us is undoubtedly a case in point against the present defendant, but the defence here relied upon was not presented to Lord Tenterden. He considered that case, as I on the trial considered the present case, to be decided by the principle clearly laid down in *Cockshott v. Bennett* (2), often recognized and never impeached ; but he was not reminded of another principle of at least equal importance which was established in *Marriott v. Hampton* (3), that what a party recovers from another by legal process, without fraud, the loser shall never recover back by virtue of any facts which could have availed him in the former proceeding. Money so recovered was not received to the plaintiff's use : it was received to the use of the successful party by authority of law. If any error was committed in the former proceeding, still the plaintiff is estopped from proving it after failing to do so at that time. If this were otherwise, the rights of parties could never be finally settled by the most solemn proceeding ; and verdicts and judgments might be rendered *nugatory by evidence which, if produced at the proper season, might have received a complete answer. The *Duke de Cadaval's* case (4) was not intended to be, nor is it, inconsistent with this doctrine. It turned on fraud and extortion practised by an abuse of *ex parte* legal process by one who knew that he had no right to the money he obtained. That money still remained the property of the Duke, though unjustly taken out of his possession. But where the recovery is by legal process, the loser never can contend that the property is his.

I am reminded by my brother PATTESON, that in the present case no action was brought on the bills in question but they were voluntarily paid after they became due. I think the same principle applies. This plaintiff might have then refused payment, and if the defendant's agent, the drawer, had brought his action on the acceptance, he had the opportunity of defending himself by the illegal nature of the consideration. He waived the advantage,

(1) Dowl. & Ry. N. P. 27.

(2) 1 R. R. 617 (2 T. R. 763).

(3) 4 R. R. 439 (7 T. R. 269).

(4) *The Duke de Cadaval v. Collins*,
43 R. R. 499 (4 Ad. & El. 858).

and voluntarily paid the bills with full knowledge of all the facts. I am of opinion that it is not now open to him to deny that he was liable on them.

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LITTLEDALE, J.:

I am entirely of the same opinion, and I think the circumstance just adverted to makes no difference.

PATTESON and COLERIDGE, JJ. concurred.

Rule absolute.

GREGG v. WELLS.

(10 Adol. & Ellis, 90—98; S. C. 2 P. & D. 296; 8 L. J. (N. S.) Q. B. 193.)

1839.
May 2.

[90]

The owner of goods, who stands by and voluntarily allows another to treat them as his own, whereby a third person is induced to buy them *bonâ fide*, cannot recover them from the buyer (1).

G., the owner of the fittings of a public-house, demised them to D., who thereupon became tenant of the house to a third party, under an agreement which gave his landlord a lien on the fittings. G. was present at the execution of the agreement. D. afterwards sold the good-will and fittings, without G.'s knowledge or assent, to W., who, being told by the landlord that D. was his tenant, bought them *bonâ fide*, in ignorance of G.'s title, and was accepted by the landlord as tenant in the place of D.

Held that G. could not maintain trover for the fittings against W. And that the defence was admissible on the plea of not possessed.

TROVER for goods, being the fittings and furniture of a public house. Pleas, 1. Not guilty. 2. Plaintiff not possessed of the goods as of his own property.

On the trial before Lord Denman, Ch. J., at the Westminster sittings after Trinity Term, 1837, it appeared that, in 1835, plaintiff bought the good will, fittings, &c., of the public house, and put in Heath, a relation, as tenant, in whose name the business was carried on, and the requisite licences were transferred. The premises belonged to Messrs. Elliott & Co., brewers, who accepted Heath as tenant from year to year at the rent of seventy guineas. As the business proved unprofitable, Heath gave it up; and plaintiff, in January, 1836, entered into the following agreement with one Durham. "Memorandum of agreement, made this 2nd day of January, 1836, between William Henry Gregg, of the one part, and Alexander Durham, of the other part. The said W. H. Gregg hereby agrees to let, and the said A. Durham hereby agrees to take, the public house called" &c., "with the fittings

(1) *Freeman v. Cooke* (1848) 2 Ex. 654, 18 L. J. Ex. 114.

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up of the same, and the several fixtures and things now in and upon the same, to hold to the said A. Durham from Christmas last for one year, at the yearly rent of 90*l.*, payable quarterly on the usual days; and the said A. Durham agrees to pay the said rent, and all taxes and outgoings, including sewer rate and land tax, and to keep all the premises in good and substantial repair, to use the said premises as a *public house, and for no other purpose; and will do every thing to preserve the same as a public house, and duly licensed as the same now is; to take due care of and preserve all the fixtures and fittings up now in the said premises, and, at the expiration of one year, surrender the same in good preservation together with the said premises, unto the said W. H. Gregg; provided always the said A. Durham shall be at liberty to purchase all the interest and right of the said W. H. Gregg in and to the said premises, fittings up, and fixtures, and the licence thereof, at any time during the said twelve months for which the same are agreed to be let, for the sum of 280*l.*; and upon payment of the said sum of 280*l.* this agreement shall be at end, except that the said A. Durham shall be liable to pay a proportion of rent up to the time of the payment of the said purchase-money. In witness," &c.

[*92]

Plaintiff handed to Durham an inventory of the furniture, including the goods in question, being the original inventory which he had himself received when he bought the same in 1885. Plaintiff and Durham then went to Messrs. Elliott, who, upon being paid by the plaintiff the balance of Heath's account, agreed to accept Durham as their tenant from year to year at the same rent of seventy guineas. The written agreement entered into on this occasion between Messrs. Elliott and Durham provided "that Durham should quit upon notice at the end of any three months, and should then deliver up his licences to such persons as Messrs. Elliott should appoint, and that whenever Durham should quit, all arrears of rent, taxes, or other monies due to Messrs. Elliott should be deducted by the brokers from the valuation of the goods and effects of Durham, and paid to *Messrs. Elliott." Gregg, the plaintiff, was present at the signing of this agreement, on which occasion a change in the time of its commencement was made; but he was not known to, or recognised by, Messrs. Elliott, except as a friend of Heath, on whose behalf they supposed that he acted; nor were they acquainted with the agreement between plaintiff and Durham. Durham took possession, insured the premises, and

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carried on business in his own name; he paid the ground rent to Messrs. Elliott, and obtained receipts in his own name, made considerable alterations in the fittings, and in every respect appeared to be, and acted as, owner and tenant of the property until October, 1886, when he advertised the good-will and furniture for sale, and eventually (October, 1886) sold the same to the defendant. Defendant had been previously referred by Durham to Messrs. Elliott, who informed him that Durham was their tenant. Defendant was then admitted tenant by Messrs. Elliott in the place of Durham. At the expiration of the year of Durham's agreement with the plaintiff, the latter demanded the furniture, fittings, &c. of the defendant, to whom he had previously (but not until after the purchase by defendant, and substitution of him as tenant to Messrs. Elliott) notified that they belonged to him. Defendant refused to deliver them. There was no proof that plaintiff knew of, or sanctioned, the sale by Durham to defendant, or that defendant was not a *bonâ fide* purchaser from Durham in ignorance of any claim or title of the plaintiff.

The LORD CHIEF JUSTICE told the jury that, if they were satisfied the plaintiff had so allowed Durham to deal with the property as to hold him out to the world as the owner of it, and the defendant had been thereby *induced to purchase it *bonâ fide*, in the belief that it was Durham's, then the defendant was entitled to a verdict. The jury found for the defendant.

[*93]

In Michaelmas Term following *Platt* obtained a rule *nisi* for a new trial, on the ground of misdirection and insufficiency of evidence.

Sir F. Pollock and *Chambers* now showed cause :

There was evidence that the plaintiff was privy to the contents of the agreement between Messrs. Elliott and Durham, and permitted Durham to assume the character of tenant to them, and owner of the fixtures and furniture. When he saw the landlords calculating on the value of the effects on the premises as a security for arrears due to themselves, it was his duty to inform them that the effects did not belong to their tenant. In concealing from them the state of things between him and Durham, he enabled the latter to obtain a credit with them, and with others who might deal with him, which he would not otherwise have had. *Pickard v. Sears* (1) is in point, and establishes the general principle that one who, by his language or conduct, wilfully causes another to believe the

(1) 45 R. B. 538 (6 Ad. & El. 469).

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existence of a certain state of things, and induces him to act on that belief so as to alter his own position, cannot afterwards aver a different state of things against the party whom he has misled. *Hunsden v. Cheyney* (1) and *Hill v. Gray* (2) are to the same effect. There is no distinction in principle, although the party who enables another to assume the credit of ownership may not be actually present when the act is done by which the third party is deceived; nor *is it material here that the title to the property may have been really vested in Gregg at the time of the sale by Durham, and that the latter may have deceived Gregg; for where one of two persons is to lose by the fraud of a third, it is fit that he should be the loser who has put the fraudulent party in a condition to practise the imposition. On this ground it has even been held that if the bailee of goods deliver them to a stranger, the bailor cannot bring trover against the stranger: Bro. Ab. Tresp. pl. 216, cited 7 Bac. Ab. 808, Trover, C. (3), although this case cannot, perhaps, be supported in its full extent. *Herr v. Nichols* (4) and *Hartop v. Hoare* (5) recognize the same principle.

[*94]

(PATTESON, J.: There are cases in which a defendant has been allowed to set off a debt due from a party in the apparent possession or ownership of goods against a demand by the real owner (6).)

The facts here would enable the defendant to maintain an action on the case for deceit against the plaintiff, if he were now obliged to give up the property to him: Com. Dig. Action upon the Case for a Deceit, (A 8) (A 10); *Pilmore v. Hood* (7): so that it would tend to circuity of action, if the plaintiff were now permitted to recover.

Platt and Knowles, contra:

It is not denied that the goods really belonged to the plaintiff. He ought therefore to recover for them, unless actual misconduct on his part can be proved. It does not follow that Gregg knew the contents of the whole agreement between Messrs. Elliott and Durham, merely because he appears to have *been privy to an alteration in one of its terms. Even if he knew the contents of it, a case of fraud is not established; for it is not to be presumed that

[*95]

(1) 2 Vern. 150.

(2) 18 R. R. 802 (1 Stark. 434).

(3) 7th ed. The citation in Bacon is incorrect: In Bro. Ab. it is only said that trespass will not lie.

(4) 1 Salk. 289.

(5) 1 Wilson, 8.

(6) See *Carr v. Hinchliff*, 4 B. & C. 547.

(7) 5 Bing. N. C. 97.

Durham had no other "goods and effects" from which a deduction might be made; and, supposing that Gregg's goods were intended, yet as the agreement between him and Durham provided that these should become the property of Durham on payment of 280*l.* during the year, there was no deception, nor representation inconsistent with what might have been eventually the fact. Besides the misrepresentation, if any, was to Messrs. Elliott and not to the defendant. In *Pickard v. Sears* (1) the mortgagee, who brought the action, had made himself a party to the sale, and had sanctioned it. The rule of law must prevail in favour of the real owner, unless the Court shall decide that he was bound, on an attempt of the lessee to deal with the goods, to take active measures for notifying and asserting his claim. Nothing but a sale in market overt will bar the true owner: *Wilkinson v. King* (2), *Loeschman v. Machin* (3). Furniture, demised with the premises, will not pass to the assignees of the lessee, because a third party ought not to presume that it belongs to the tenant.

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(PATTESON, J.: A distinction has been made between ordinary furniture, and furniture used in the bankrupt's trade and business (4).

LORD DENMAN, Ch. J.: It is always a question of fact, and not of law, whether goods are in the order and disposition of the bankrupt.)

At all events, the plea should have been special, and not a mere denial of the plaintiff's property, which is undisputed. The mere possession of Durham gave no right to convey *to the defendant: *Jaullery v. Britten* (5); whereas the plaintiff's interest gives him a *prima facie* title to recover.

[*96]

(COLERIDGE, J.: In *Owen v. Knight* (6) the facts stated in the third plea, viz., that the plaintiff had delivered the indenture to one Feary to raise money on it, and he had pledged it to the defendant, were held to be admissible on the second plea of "not possessed." In that case, too, the defendant was allowed to set up a lien, although the agent, Feary, had exceeded his authority, and the

(1) 45 R. R. 538 (6 Ad. & El. 469). 82, 88.

(2) 2 Camp. 335.

(5) 4 Bing. N. C. 242.

(3) 20 B. R. 687 (2 Stark. 311).

(6) 44 R. R. 649 (4 Bing. N. C. 54).

(4) See *Lingham v. Biggs*, 1 Bos. & P.

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plaintiff had not been directly a party to any misrepresentation to, or deception upon, the defendant.)

There the plaintiff, at all events, delivered the lease to Feary for the purpose of parting with the possession of it as security for a loan, although the precise directions given to him were not pursued.

LITLEDALE, J.:

There are two questions: first, was the direction to the jury right? I am of opinion that it was, and that the case falls within the rule laid down in *Pickard v. Sears* (1). Next, was the verdict supported by the evidence? On this head there was certainly evidence to go to the jury, and I cannot say they were wrong.

PATTESON, J.:

The direction was right, and the facts support the verdict. The goods are demised with the premises by the plaintiff to Durham for one year, with liberty to purchase the plaintiff's interest in them within that period. I am far from saying that this alone would have given Durham any authority to sell the goods; but Durham then becomes tenant to Messrs. *Elliott, under an agreement at variance with the former one, and entered into in the presence of the plaintiff himself, containing a clause to enable Messrs. Elliott to deduct arrears, due from Durham, from the valuation of his goods and effects. The plaintiff does not then say a word about his own title to the goods. Had Messrs. Elliott been the defendants, the point would have been identical with that in *Pickard v. Sears* (1). Here the defendant is referred by Durham to Messrs. Elliott, by whom he is told that Durham is their tenant. The error is, therefore, one entirely originating in the fault of the plaintiff, who held out Durham as owner, through the medium of Messrs. Elliott.

[*97]

COLERIDGE, J.:

Suppose the action had been between the plaintiff and Messrs. Elliott; the latter would have had good ground for believing Durham to be the owner in consequence of the plaintiff's representation. If so, then Messrs. Elliott have a title as against the plaintiff, which they can convey to the defendant. As between the plaintiff and Messrs. Elliott, the plaintiff is known only as the friend of Heath the previous tenant; and he stands by, without interposition or objection, whilst Messrs. Elliott and Durham

become parties to an instrument which gives Messrs Elliott the right of interfering with the furniture of the house under certain circumstances. It is through the act, or the silence, of the plaintiff, that Durham is thus enabled to hold himself out as the owner.

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LORD DENMAN, Ch. J. :

Pickard v. Sears (1) was in my mind at the time of the trial, and the principle of that case may be stated even more broadly than it is there laid *down. A party, who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. The defence here is, in substance, collusion between Durham and the plaintiff. As to the evidence, I think a second jury would find the same verdict, and would be justified in finding it.

[*98]

Rule discharged.

PHELPS AND OTHERS v. LYLE.

(10 Adol. & Ellis, 113—117; S. C. 2 P. & D. 314; 8 L. J. (N. S.) Q. B. 236.)

1839.
May 3.

[113]

The directors of a private Company, formed under a deed of settlement, sued upon a contract made with themselves as directors. On the trial it appeared that there was another director, not named as plaintiff, who had become bankrupt, and had ceased and declined to act, or attend the board of directors, when the contract was made.

Held (on *non assumpsit*), that the plaintiffs ought to have produced the deed to show that they had authority, in the character of directors, to sue for the Company; and also to show that the office of director was determined by bankruptcy, or by voluntarily ceasing to act.

ASSUMPSIT by four persons on a bargain and sale of a steam engine to defendant. Averment, that plaintiffs were ready and willing to deliver, but defendant refused to accept it. Pleas, 1. *Non assumpsit*. 2. Denial of the bargain and sale. 3. Denial that plaintiff was ready and willing, &c. 4. That defendant did not refuse to accept, but that plaintiffs refused to deliver, or to permit defendant to take it away: verification. Replication to the last plea, *de injuriâ*, generally.

On the trial before Lord Denman, Ch. J., at the sittings in London after Trinity Term, 1837, it appeared that the plaintiffs were directors of a joint stock Company, called the London United Mine Company, consisting of several shareholders besides the

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plaintiffs, and formed under a deed of settlement, which was not produced. It was shown that a person named Chance, not joined as co-plaintiff, had been a director seven years before the contract declared on an action brought; that he then became bankrupt, and had ever since declined and ceased to act or attend boards as director, but was still alive, and held shares. Two other directors were dead. The entire number had been seven. A correspondence between defendant and the secretary of the Company was put in, to prove a contract with the directors, in which the secretary sometimes spoke in the name of the directors, and sometimes of the Company generally. On the defendant's part it was objected [*114] that the letters showed no binding contract, but only proposals *and negotiation; that the Statute of Frauds was not satisfied; that the contract, if any, was with the Company, and, consequently, that all the shareholders should be joined as plaintiffs; that if the contract was with the directors, Chance should have been joined as plaintiff, or his non-joinder accounted for; and that the deed of settlement ought to have been produced. The jury found a verdict for the plaintiff, leave being reserved to move to enter a nonsuit on the above points.

In Michaelmas Term following a rule *nisi* was obtained accordingly upon the effect of the correspondence, and on the ground that the plaintiffs were not the proper parties to sue.

Sir F. Pollock and Swann now showed cause :

Whether the plaintiffs are the proper parties to sue depends on the question of fact, with whom the defendant contracted? Chance never acted as director at the time of the contract, it is impossible, therefore, to suppose that any contract was made with him. If there was a doubt, it ought to have been left to the jury to say whether Chance was or was not a director at the time of the correspondence. If the assignees of a bankrupt contract through their solicitor during the absence of one of them, who has never acted and has been many years abroad, it is clear that they, and not the absent person who was no party to the contract, should sue and be sued on it. Those who contract with a fluctuating body, and in general terms, must be taken to be dealing with the persons who actually constitute the body and have not voluntarily receded from it: *Metcalf v. Bruin* (1). It is said the deed of settlement should be *produced; but the cause of action is independent of it.

[*115]

It is enough to show that the bargain was made with the then directors, and that the plaintiffs were then acting as such. If the action were on an implied contract, it might be otherwise. (The argument on the other points is omitted.)

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Sir J. Campbell, Attorney-General, and *Butt*, *contrà* :

If the contract was with the directors, they should have all joined in the action, for the action must be by the parties actually contracting, or those really interested: *Skinner v. Stocks* (1). It was not proved that Chance had ceased to be a director: mere bankruptcy and non-attendance would not discharge him, unless there was a provision to that effect in the deed, which was not produced. Bankruptcy would only divest him of a beneficial interest; and absence from the board only proves a neglect of duty. The contract was not between defendant and certain named persons, A., B., C., in which case they alone might have sued, but between him and the "directors" generally, whom the secretary represented. It is said the evidence should have been left to the jury; but this was not requested on the trial, where the question was treated by both sides as matter of law. Then, if there was any special provision authorizing the directors to contract and sue in trust for the Company, the deed of settlement should have been produced. *Dickinson v. Valpy* (2) and *Bramah v. Roberts* (3) show that special powers must be proved by the original deed from which they are derived.

LORD DENMAN, Ch. J.:

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This is an action by four of the directors of a private Company for not accepting goods sold by them to the defendant. The correspondence adduced in evidence tends rather to prove a contract with the Company than with the directors, but this is a point which we need not consider. It is clear that the plaintiffs, whose right of action, if any, depends on the fact of their being the directors, must prove themselves to be such, and if a party who was a director has been omitted, the plaintiffs must show that his character of director has been legally determined. For this purpose they ought to have produced the deed.

LITLEDALE, J.:

The Company may authorise certain persons to act for them,

(1) 23 B. B. 337 (4 B. & Ald. 437).

(3) 3 Bing. N. C. 963.

(2) 34 B. B. 348 (10 B. & C. 128).

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and to sue alone upon contracts expressly entered into with them. Such persons would be called directors. Are the plaintiffs such directors, and have they power to sue on behalf of the Company? This cannot be satisfactorily shown without producing the deed. As to Chance, he appears to be still interested as a shareholder; neither his bankruptcy nor his non-attendance necessarily put an end to his character of director, unless it be so provided by the settlement deed, which was not in evidence.

PATTESON, J.:

[*117]

I give no opinion on the question, whether the contract here was with the directors or the Company, but assume that it was with the former. Of these there were seven. Two are dead. Another is still living. It lies on the plaintiffs to prove that he has ceased to be a director, and by what circumstances. Absenting himself from the board does not, in point of *law, make him cease to be one. His omission to do duty is no proof that he has none to perform.

COLERIDGE, J.:

The directors are not those only who happen to attend a board, or to meet on a particular day, but those who are directors by the provisions of the deed of settlement. The plaintiffs, therefore, ought to have shown themselves to be the proper parties to sue by producing it.

Rule absolute for entering a nonsuit.

1839.
May 4.

[117]

DE GONDOUIN v. LEWIS AND ANOTHER.

(10 Adol. & Ellis, 117—121; S. C. 2 P. & D. 283.)

In trespass for taking a portfolio and drawings, the defendant, an officer of the customs, may justify the seizure by showing that the portfolio contained drawings liable to seizure for non-payment of duty, which the plaintiff was in the act of carrying ashore out of a foreign packet; though the seizure was in fact made not as on a forfeiture, but for the purpose of examination; and though the articles seized were in fact returned after being examined; and no demand of them had been made before the seizure.

Seemle, that if the plaintiff had sued for the assault, the defendant could not have justified without showing either a previous demand or some circumstance to warrant the use of force in the first instance.

TRESPASS by an infant (who sued by G. Humbert as *prochein amy*) for taking and detaining a portfolio and drawings. Plea, Not guilty.

On the trial before Lord Denman, Ch. J., at the Lewes Summer Assizes, 1837, it appeared that the plaintiff was a French boy who had arrived at Brighton by a packet at a late hour of the evening in the month of September. The defendants, who were officers of the customs, required that all luggage, except night-things, should be left on board for examination on the following morning. The plaintiff was in the act of passing from the boat to the pier by a plank or platform with a portfolio containing some drawings, when defendants forcibly took *it from him. It was not proved that defendants had first asked him to deliver it up. Early on the following morning it was examined and returned to plaintiff by one of the defendants, who said "it was all right." The notice of action was in the following form, "To Mr. Comptroller Lewis," &c. "You having wrongfully seized and taken from the person of Adolphe de Gondouin of " &c. "his portfolio, containing drawings, the performance of his own hand, and not contraband or seizable" &c. "I do, therefore, give you and each of you notice that I shall, at or after the expiration of one calendar month from the service of this notice, cause a writ of summons to be sued out of the Court of King's Bench against you, and each of you, at the suit of the said A. de Gondouin for the said trespasses, and proceed thereupon." Dated &c. Signed "Yours &c. AUGUSTUS PITCHER, No. 88," &c. "acting on behalf and as the *prochein* friend of the said A. de Gondouin, an infant of the age of ten years." Pitcher, who signed the notice, was the attorney whose name was indorsed on the writ as attorney of the *prochein amy* on the record.

At the trial it was objected, 1. that the notice was insufficient; but the objection was over-ruled, with leave to mention it to the Court above, if necessary: 2. that the defendants had a right to detain the goods for examination at a convenient time; 3 & 4 Will. IV. c. 52(1), ss. 2, 14, 56, & 57; and that, as the goods were admitted to be drawings, which are liable to a duty by 3 & 4 Will. IV. c. 56(1), and were illegally unshipped, they were forfeited, and might be seized accordingly; 3 & 4 Will. IV. c. 53(1), ss. 15, 28, 32. The LORD CHIEF JUSTICE was of opinion that a defence was made out, but directed the jury to find such damages as they thought fit on the supposition *of the seizure being illegal. The jury found one farthing damages; whereupon the plaintiff was

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(1) Repealed 8 & 9 Vict. c. 84, s. 2. and the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12), s. 12. But see the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), *passim*, —R. C.

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nonsuited, with liberty to move to enter a verdict for that amount. *Wallinger*, in the following Term, obtained a rule *nisi* accordingly.

Sir J. Campbell, Attorney-General, and *Spankie*, Serjt. now showed cause:

The notice was insufficient. Stat. 3 & 4 Will. IV. c. 53 (1), s. 103, requires notice of action "by the attorney or agent of the party." Pitcher was *prochein amy*, and not attorney, of the plaintiff; and though it will be said that an infant cannot appoint an attorney, yet his *prochein amy* can. Independently of the notice, the drawings had been actually taken out of the boat without paying or securing the duty; this occasions a forfeiture of the drawings and of the portfolio containing them, by 3 & 4 Will. IV. c. 53 (1), s. 28. Then, all goods liable to forfeiture may be seized in any place by an officer of the customs, by sect. 32 of the same Act.

Wallinger, *contra*, was stopped, upon the point of notice, the COURT expressing a clear opinion that a *prochein amy* was a sufficient attorney, or at all events, an "agent" for the purpose of giving the notice. As to the merits, the drawings may possibly have been articles exempted from duty; at all events they were not taken as forfeited. The return of them to the plaintiff shows there was no intention to seize on that ground. If the plea had been special, the plaintiff might have newly assigned that they were seized for another and different purpose, and not as forfeited. Even if forfeited, they ought to have been demanded before seizure.

[*120] It is questionable whether the defendants ought to have *forcibly taken them from the person at all: a seizure under such circumstances is against common right, as appears by the rule against taking, under a distress or execution, an article in use, or on the person: *Storey v. Robinson* (2), *Sunbolf v. Alford* (3). It is a breach of the peace.

(LORD DENMAN, Ch. J. : That is not your complaint here.

COLERIDGE, J. : If personal custody is to protect forfeited goods, the revenue laws cannot be enforced. If there was personal violence, the plaintiff has not brought his action for it; and, as for the goods, they, being forfeited, were no longer his.)

(1) See note (1), last page.

(3) 49 R. R. 593 (3 M. & W. 248).

(2) 3 R. R. 137 (6 T. R. 138).

It was not shown upon the trial that the goods were actually forfeited.

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(PATTESON, J.: Sect. 32 authorises seizure of goods "liable to forfeiture.")

LORD DENMAN, Ch. J.:

If the plaintiff had sued in trespass for an assault, the evidence would not have amounted to a justification; for I do not think an officer can forcibly take goods from the person without a previous demand, unless, indeed, there be fraud, or something to justify the use of force in the first instance. But here the action is in respect of the goods, which were undoubtedly liable to seizure. *Storey v. Robinson* (1) was an action for an assault, and is therefore inapplicable.

LITTLEDALE, J.:

The goods were actually unshipped, and being liable to a duty, and, therefore, to forfeiture for non-payment of it, were justly seized by the defendants.

PATTESON, J.:

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If a demand had been required as a condition precedent to seizure, the defendants could not have justified; but there is no such requisition. The goods, therefore, were liable to seizure; and as for any unlawful violence in the act of taking, the plaintiff has not made that the subject of his action.

COLERIDGE, J. concurred.

Rule discharged.

DOWN *v.* HATCHER AND CHARLOTTE, HIS WIFE,
EXECUTRIX OF ROGERS (2).

(10 Adol. & Ellis, 121—124; S. C. 2 P. & D. 292; 8 L. J. (N. S.) Q. B. 190;
3 Jur. 651.)

1839.
May 4.

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In *indebitatus assumpsit* for various debts, amounting in the whole to 500*l.*, the declaration admitted payment of 158*l.* on account, and alleged that the residue remained unpaid, to plaintiff's damage of 200*l.* Plea, as to the said residue, that defendant paid, and plaintiff accepted, 6*l.* 10*s.* in full satisfaction thereof, and of all causes of action in respect thereof.

(1) 3 B. R. 137 (6 T. R. 138).

in *Foakes v. Beer* (H. L. 1884) 9 App.

(2) See all the authorities considered

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The replication denied the payment in satisfaction, and, upon issue joined, the jury found for defendant.

Held, that the plea, alleging the acceptance of a less in satisfaction of a larger sum, was bad after verdict; and that plaintiff was entitled to judgment *non obstante veredicto*.

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INDEBITATUS ASSUMPSIT for 800*l.* for the use and occupation of a dairy farm by Rogers, the testator. 2nd count, for 100*l.* for agistment of testator's cattle. 3rd count, for 100*l.* for money due on an account stated between plaintiff and testator. Breach, that although the plaintiff had received 158*l.* 5*s.* 8*d.* on account of the said several sums, "yet the residue thereof, to wit, the sum of 500*l.* remained unpaid" &c., to the plaintiff's damage of 200*l.* Plea, as to the said residue of the said sums, that after the promise and before action, defendant Charlotte, as such executrix, paid plaintiff 6*l.* 10*s.* in full satisfaction and discharge of the said residue, and of all causes of action in respect thereof; and that plaintiff accepted and received the said 6*l.* 10*s.* in such full satisfaction and discharge as aforesaid. Verification. Replication, that defendant, Charlotte, as such executrix, did not pay plaintiff the said sum, *modo et formā*. Conclusion *to the country. The particular of demand was for 240*l.* for the rent of a dairy of twenty-four cows, and gave credit for 158*l.* 5*s.* 8*d.*, leaving the difference (81*l.* 14*s.* 4*d.*) as the sum sought to be recovered. At the trial before Patteson, J. at the Summer Assizes at Bridgwater, 1837, the defendants obtained a verdict. In the following Term, Barstow obtained a rule *nisi* for judgment *non obstante veredicto*, or for a new trial on the ground of a perverse verdict.

Rogers and Fitzherbert now showed cause (1) :

The question is, whether this plea of payment is bad after verdict. The damages sought to be recovered by the declaration are limited to 200*l.*; and the sum of 6*l.* 10*s.* is pleaded as accepted in satisfaction. This would perhaps be bad on demurrer, on the ground that a less sum can be no satisfaction of a greater; *Cumber v. Wane* (2), *Fitch v. Sutton* (3), *Thomas v. Heathorn* (4); but if there be any circumstances under which a less sum may be a legal satisfaction of a greater, the Court will presume after verdict that such was the case here. *Wilkinson v. Byers* (5) shows that payment

(1) Before Lord Denman, Ch. J., Little-
dale, Patteson, and Coleridge, JJ.

(2) 1 Stra. 426.

(3) 5 East, 230.

(4) 2 B. & C. 477. Smith's Leading

Cases, vol. i. p. 147, note to *Cumber v. Wane*, was also cited.

(5) 1 Ad. & El. 106; and see *Reynolds v. Pinkhow*, Cro. Eliz. 429, there cited.

of the same, or a less sum than the sum demanded, may be a good consideration for a promise to stay proceedings; as where the debt is unliquidated, and the Court would interfere to stay an action continued after such payment, and acceptance. If so, it seems to follow that such payment, if pleaded, would be an answer to the action. PARKE, J. there says, *expressly, that payment of a less sum than the demand is a satisfaction, where the debt is unliquidated. Here the action is for unliquidated damages; and although the plaintiff necessarily specifies the sum at which he estimates his damage, that amount is not material. In *Jourdain v. Johnson* (1), a plea of payment into Court of a less sum seems not to have been considered bad by the Court on that ground, but because it treated several counts as one. A distinction is there made between debt and assumpsit. *Wright v. Acres* (2) is strongly in favour of the plea. There a plea of payment of 10*l.* in satisfaction of the promises and damages, pleaded to a declaration of *indebitatus assumpsit* containing two counts for 10*l.* each, and laying the damages at 20*l.*, was held good after verdict; and though it is true that a *nolle prosequi* as to one count had narrowed the issue, yet it does not appear that the decision of the Court depended altogether upon that fact (3). *Mee v. Tomlinson* (4) was decided on special demurrer.

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Barstow, contra :

Though there may be no case in which a similar plea has been decided to be bad after verdict, yet, as this is admitted to be bad on general demurrer, and there is nothing in the verdict that can cure the defect, it must be taken to be still bad. *Thomas v. Heathorn* (5) shows that the plea is bad in substance, and that if such a transaction can constitute a defence, it should be pleaded according to its legal effect, viz. as a payment of the whole, and a return of part by way of a *gift. It is true that an agreement to accept part, founded on a sufficient consideration, may be a defence; but the agreement must be pleaded, and cannot be left to presumption or conjecture even after verdict. Serjt. Williams, in note (1) to *Stennel v. Hogg* (6), lays down the rule, that where the issue joined necessarily required, at the trial, proof of the

[*124]

(1) 2 Cr. M. & R. 564.

(2) 6 Ad. & El. 726.

(3) A report of the same case was read from Will. Woll. and Dav. 328, which was more favourable to the

defendants.

(4) 4 Ad. & El. 262.

(5) 2 B. & C. 477.

(6) 1 Wms. Saund. 228.

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facts defectively stated or omitted, there the defect or omission is cured by verdict. But here the only question in issue was, whether 6*l.* 10*s.* was accepted in satisfaction of the residue, which may be quite true, and yet no answer. It is impossible to presume that the jury found payment of enough to cover all the residue mentioned in the declaration; for that was never in issue. (He then offered to take a verdict with nominal damages, if the defendants would consent; upon which the COURT suspended their judgment.)

LORD DENMAN, Ch. J., on a subsequent day of the Term, (Wednesday, May 8th) delivered the judgment of the COURT, that the plea was bad after verdict, and that there must be judgment *non obstante veredicto*.

Rule absolute for judgment non obstante veredicto.

1839.
May 7.
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PRICE v. POPKIN.

(10 Adol. & Ellis, 139—144; S. C. 2 P. & D. 304; 8 L. J. (N. S.) Q. B. 198; 2 Jur. 433.)

On submission of a cause and all matters in difference between lessor and lessee, the costs to abide the event, an award that certain fixtures have been wrongfully removed by lessor, to the value of 1*l.*, and that lessee shall set up others in their place, to be left for lessor at the end of his term, and that lessor shall pay lessee 1*l.* on a specified day, is bad for want of authority, though the removal of the fixtures was in fact a matter in difference on the arbitration: Held, also, that the award was uncertain, in not specifying the value, quality, or description of fixtures to be set up by the lessee, and might be set aside by the lessor.

An untrue recital in an award, of an extension of the arbitrator's power by agreement of the parties, will not cure an excess where the truth appears upon affidavit.

COVENANT by lessee against landlord for not repairing the demised premises. There were several pleas on which issues were joined; but, before trial, a Judge's order was obtained, whereby "the cause and all matters in difference between the parties thereto" were referred to arbitration, the costs of the suit to abide the event, and the costs of the reference to be in the discretion of the arbitrator.

The award directed a verdict to be entered for the plaintiff on all the issues, and ordered payment of damages in respect of the breaches of covenant. It further recited that "the parties, among other matters in difference, had referred to the arbitrator to say

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and adjudge whether certain grates, locks, bolts, and fastenings were part and parcel of the demised premises in the declaration named, and further to order and adjudge what should be done to make a final end and determination of such matters in difference," and then proceeded to find and adjudge "that the said grates, locks, bolts, and fastenings were part of the demise of the defendant to the plaintiff, and were removed and carried away by the defendant from the dwelling-house named in the declaration, and applied to his own use, and that such fixtures were of the value of 11*l.* 5*s.*" It then ordered the plaintiff "to fix and set up other grates, locks, bolts, and fastenings in the place and stead of such as were removed as aforesaid, and to leave the same to *and for the use of the defendant at the end of the term named in the declaration;" and further directed payment of the said sum of 11*l.* 5*s.*, and of the damages assessed on the breaches, by the defendant to the plaintiff, on a specified day.

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In Hilary Term last, a rule *nisi* was obtained on behalf of the defendant to set aside the award, on the grounds, 1. that the arbitrator had no power to direct a verdict to be entered; 2. that the award was bad for uncertainty, in not stating the price, number, quality, description, or value of the grates, &c. to be set up, or in any way ascertaining the same; 3. that the arbitrator had no authority to direct the plaintiff to set up the grates, &c. as directed in the award; 4. that the award, as to the grates &c., did not pursue the terms of the submission as recited in the award, inasmuch as the question, as there recited, was, whether the grates, &c., were parcel of the demised premises, and the award determined another question, namely, that they had been removed and converted by the defendant.

The affidavit by defendant and his attorney, on which the rule was obtained, stated that a claim had been made by the plaintiff on the reference for damages for divers grates, locks, bolts, and fastenings alleged to have been removed by the defendant from the premises, but that the defendant "did not in any way agree to refer it to the arbitrator to order what should be done to make a final end and determination of such claim," and that "there was no new, or special, reference of the said claim, other than the said Judge's order."

Several affidavits in answer stated, among other things, that at the time of the reference there were several matters in difference, and that one of them * "related to certain grates, locks, bolts, and fastenings, alleged to have been removed by the defendant from the dwelling-house, after the demise thereof by him to the plaintiff;"

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that, during the progress of the reference, it was agreed between the attorneys of the parties to refer to the arbitrator other matters in difference, "including the said question as to the said grates," &c., and the counsel who attended on behalf of the defendant did accordingly contend before the arbitrator that the said grates, &c. were not parcel of the demise. A further affidavit, by an iron-monger, stated that he had been employed by plaintiff after the award to ascertain what grates, locks, bolts, and fastenings were required to be set up in lieu and stead of those which had been removed; that he had ascertained without difficulty, by the marks, from what places they had been removed, and had supplied others "such as were fit, proper, and suitable for the said house, and such as were usually set up and used in similar houses," and that the same were afterwards set up by the plaintiff in the place and stead of those which had been removed; and that "there was no difficulty in ascertaining either the price, number, quality, description, or value of such grates, &c., or in what places the same were to be set up."

W. H. Watson showed cause:

[*142] It must be admitted that the award of a verdict cannot stand, there having been no verdict of a jury taken, nor any power to enter one by the order of reference (1). But this may be struck out without affecting the rest of the award; for, as there is a finding and award of damages *on each issue, there is a sufficient "event" for the purpose of showing on whom the costs of the action are to fall. As to the objection of uncertainty, the award, in directing fixtures to be placed instead of those taken away, must be intended to mean that reasonably good ones must be placed where the former ones stood. It is impossible to be more particular as to value or kind, nor is it required in similar cases. Thus an award that a party shall do repairs is usual, and sufficiently certain. Mere uncertainty as to the value or amount is not enough to make the award bad, if these can readily be reduced to a certainty: *Beale v. Beale* (2), *Hanson v. Liversedge* (3); nor does it appear that there was here any difficulty or dispute on this point; indeed, the contrary is shown by one of the plaintiff's affidavits, and, in fact, the plaintiff has proceeded to replace the fixtures in pursuance of the

(1) *Donlin v. Brett*, 41 R. R. 453 (2 Ad. & El. 344); *Hayward v. Phillips*, 45 R. R. 421 (6 Ad. & El. 119).

(2) 1 Rol. Ab. 251, Arbitrement (H) pl. 14; *S. C. Cro. Car.* 383.

(3) 2 Vent. 242.

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award. *Cargey v. Aitcheson* (1), *Wohlemberg v. Lageman* (2), are in favour of the award. As to the supposed excess of authority in awarding that the plaintiff shall replace the fixtures, the submission was of all matters in difference; and, notwithstanding the discrepancy in the affidavits, it is sufficiently clear that the question was discussed before the arbitrator. It is found that the fixtures were included in the demise, that they had been removed, and were worth a certain sum, which the defendant is directed to pay. The further direction to replace them at the plaintiff's expense is in favour of the defendant, to whom they will hereafter belong, so that he has no reason to complain.

Crowder, contra :

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If the verdict be struck out, there will be no sufficient finding to enable the parties to see who is to pay costs. There is excess of authority; for the order of reference contains nothing that can give the referee power to order what is to be done by either of the parties. If the removal of the fixtures was a matter in difference, the arbitrator had only power to award damages to the plaintiff, as if he had brought an action. But here, coupling the recital in the award with the affidavits, there was at most only a reference of the question, whether certain fixtures were part of the demised premises; and if the award makes an untrue recital, extending the power further to order "what shall be done," this will not bind the Court, when the contrary appears by the affidavits of the plaintiff himself.

(LORD DENMAN, Ch. J. assented.)

The arbitrator awards that the fixtures shall be replaced by the plaintiff.

(PATTESON, J. : If the award would be good without that direction, is not the excess of authority rather for your advantage ?)

The plaintiff is not bound to replace them with others of equal value, so that, at the end of the term, when the plaintiff is to deliver them up to the defendant, the defendant may find himself in possession of articles of much less value than those which he is said to have demised. This uncertainty is another objection; the

(1) 26 R. R. 298 (2 B. & C. 170).

(2) 16 R. R. 616 (6 Taunt. 251).

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award not showing what fixtures had been removed, nor what locks and grates the plaintiff was to substitute: *Pope v. Brett* (1).

(LITTLEDALE, J.: It may perhaps be intended to mean locks and grates of the same kind as those which were removed.)

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The words of the award would be satisfied *by articles of a very different quality. It has been held that an award to pay "so much as the land is worth" would be bad (2), although its value might, perhaps, have been easily ascertained. That the plaintiff has, in fact, replaced these articles since the award, is a matter which can have no effect on the decision of the Court. The plaintiff's affidavit only states that it was easy to ascertain where the old fixtures had been, and what was the price, number, quality, &c. of those which had been set up in their stead. The objection vitiates the whole award, for it can stand only if it be good as to every part referred, and the reference of which formed the consideration for the submission.

LORD DENMAN, Ch. J.:

I regret to find myself obliged to decide that this award is bad. The arbitrator had no authority to order any thing to be done with respect to the fixtures; and, if he had such authority, he has given his directions in too uncertain a manner. The award must be set aside, not as to part only, but as to the whole.

LITTLEDALE, PATTESON, and COLERIDGE, JJ., concurred.

Rule absolute.

1839.
May 8.

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EVANS v. REES (3).

(10 Adol. & Ellis, 151—156; S. C. 2 P. & D. 626.)

On an issue respecting the boundary of a parish and county, an award in a suit *inter alios*, in which the arbitrator set out the boundary as proved before him, and a verdict was entered according to his direction, is not admissible as evidence of the boundary.

Although verdicts are, upon authority, admitted as proof of reputation, the rule does not extend to awards.

A presentment in a manor court, setting forth the bounds of a manor,

(1) 2 Saund. 292.

(2) See *Titus v. Perkins*, Skinn. 247, 248.

(3) Cited and followed by COLE-

RIDGE, J. in *Baroness Wenman v. Mackenzie* (1855) 5 E. & B. 447, 25 L. J. Q. B. 44.—R. C.

is admissible evidence of such bounds, though part of the document, unconnected with the subject of bounds, has been cut out.

Where an ancient manor-book is offered in evidence, the custody must be proved by a sworn witness. It is not enough that the book is produced in Court by the counsel or steward of the lord of the manor, nor, as it seems, by the lord of the manor in person.

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REPLEVIN for cattle taken in the parish of Ystrad Gunlais, in the county of Brecon. Avowry, *damage feasant* there. Plea, that the cattle were taken in Cadoxton parish, in the county of Glamorgan, and driven thence into the parish and county mentioned in the declaration, and impounded there. Replication, that the cattle were not taken in the parish of Cadoxton and county of Glamorgan.

On the trial before Coleridge, J., at the last Brecon Spring Assizes, the sole enquiry was as to the true boundary between the above parishes and counties. In the course of it, an award respecting the boundary was tendered on the part of the plaintiff. It appeared that an action had formerly been brought by a commoner for disturbance, to which there was a plea of not guilty, and in which a question arose respecting the same boundary, and a verdict had been taken subject to the award of an arbitrator with power to set out the boundary proved before him. By his direction, a verdict was entered for the plaintiff in that suit, and the boundary *was determined by the award. The parties to that action were neither the same as, nor in privity with, the parties to this. The learned Judge admitted the record in the action, but rejected the award. The defendant offered in evidence certain presentments of a manor court found in the castle of Brecon, in one of which the boundary was set out. Part of it, containing the parish in question, had been cut off, but the part so removed appeared to have contained entries unconnected with the subject of boundary. It was objected to as inadmissible by reason of its imperfect state. The learned Judge admitted it, though he had no doubt that the mutilation was not accidental. The plaintiff also produced certain ancient manor-books, which his counsel proposed to read without proving the custody from which they came; on the ground that the lord of the manor, Mr. Leigh, to whom they belonged, and who was admitted to be the real plaintiff, might himself have produced them in Court without further proof of custody, and might therefore authorise his counsel to do so for him. The learned Judge held them inadmissible, unless the custody from which they came was proved. Verdict for the defendant. In this Term (1)

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(1) April 22nd. Before Lord Denman, Ch. J., Littledale, Patteson, and Coleridge, JJ.

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Evans moved for a rule to show cause why a new trial should not be granted on the grounds of the rejection of the award, the admission of improper evidence, misdirection (1), and that the verdict was contrary to the evidence. The award was admissible on the same principle *as a verdict. It was proof of reputation, though *res inter alios*: *Reed v. Jackson* (2). Here the arbitrator was in the place of a jury, and the verdict, when entered, ought to be of the same weight as if actually found by them: *Lee v. Lingard* (3), *Bonner v. Charlton* (4), per LE BLANC, J. The award, coupled with the verdict, is equivalent to a special verdict. So a decree in equity between third parties has been admitted as evidence of a custom of a public nature: *Laybourn v. Crisp* (5): and analogous instances are mentioned in Bull. N. P. 293.

(COLERIDGE, J.: A jury could not have set out a boundary as the arbitrator here professed to do.)

The award is founded, indeed, on the evidence of others, but this is equally an objection to the verdict of a jury, who speak only upon the information of others.

(PATTESON, J.: I never could understand why the opinion of twelve men should be evidence of reputation.

COLERIDGE, J.: Though the doctrine is perhaps established as to the admissibility of verdicts, it does not appear to be founded on any satisfactory principle. In *Rex v. Cotton* (6), on a question of liability to repair a highway, DAMPIER, J., rejected an award as being *res inter alios* and *post litem motam*. In *Rogers v. Wood* (7), an award, not founded on personal knowledge of the facts, was held inadmissible as evidence of reputation.)

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As to the presentments, their mutilated and imperfect state ought to have excluded them, though they came from the right custody. The presumption is that the part removed was material, and against the interest of the party producing them, especially as the destruction was evidently *wilful. Their state required explanation, like erasures in a deed or other security. Then the plaintiff ought not to have been compelled to call a witness to speak to the custody of

(1) The refusal to admit the manor books was called, by the Court and counsel, misdirection.

(2) 6 R. R. 283 (1 East, 355).

(3) 1 East, 401.

(4) 7 R. R. 668 (5 East, 139).

(5) 4 M. & W. 320.

(6) 14 R. R. 780 (3 Camp. 444).

(7) 36 R. R. 554 (2 B. & Ad. 245).

the ancient documents. It was enough that counsel, or steward, or any party authorised by Mr. Leigh, produced them.

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(COLERIDGE, J. : If it be necessary to prove the custody of ancient documents, some one must be sworn for that purpose. The person producing them may have had them from a grocer's shop.)

So they may have been procured from a shop and taken to the muniment room; yet when produced from that room they would be admissible evidence. Mr. Leigh was the lawful *custos*, and he might bring them into Court himself, or hand them to his counsel or attorney in Court. (*Evans* then contended that the verdict was against evidence.)

PER CURIAM:

There was no misdirection on the last point; with respect to the other points

Cur. adv. vult.

LORD DENMAN, Ch. J., now delivered the judgment of the Court:

This was an action of replevin, and the question on which it turned was, what is the true boundary of the counties of Glamorgan and Brecon near the spot where the plaintiff's cattle were distrained? The verdict was for the defendant. On a motion for a new trial, three grounds were stated by the counsel for the plaintiff, on which the Court took time to consider, another ground as to misdirection having been disposed of upon the argument. The grounds were: First, that an award tendered in evidence was rejected by the learned Judge.

The award was made very recently in an action on the case brought by a person alleging himself to be a commoner, for digging a ditch, which the present plaintiff asserts to be the true boundary, and so disturbing the right of common. The plea in that case was Not guilty, and the cause was referred at Nisi Prius, with power to the arbitrator to set out the boundary which should be proved before him, and to direct which way the verdict should be finally entered. He directed a verdict to stand for the plaintiff, and set out the boundary, as he conceived it to be proved, by his award. That award, not being made between the same parties as those in the present action, could not be used as binding upon them, but was offered as evidence of reputation, the boundary being a matter of general and public interest. The cases of *Reed v. Jackson* (1)

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and *Laybourn v. Crisp* (1), and others, were cited to show that a verdict on such matters, although between strangers to the parties on the record, is evidence of reputation; and it was contended that the award in this case was to be considered as part of the verdict, and admissible on the same grounds.

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We cannot agree to this view of the case. The authority of an arbitrator is entirely derived from the consent of the parties to the reference; his award has no force except by reason of that consent, and no instance can be proved in which strangers have been held to be in any way affected in their rights by an award, either as evidence of right or of reputation. The award is but the opinion of the arbitrator, formed, not upon his own knowledge, as declarations used by way of reputation commonly are, but upon the result of evidence laid before *him, most probably in private, and formed also *post litem motam*, having none of the qualities upon which evidence of reputation rests. It may be said that the verdict of a jury is equally defective in such qualities. Whether it be so or not, it is sufficient to say that the admissibility of a verdict as evidence of reputation is established by too many authorities to be now questioned, but that the principle of those authorities is not clear enough to embrace an award. We are therefore of opinion that the learned Judge was perfectly right in rejecting the award.

The second ground was, that a presentment found in the castle of Brecon was admitted in evidence, although a considerable portion of the parchment on which it was written had been cut off, and it was supposed that the part cut off might have contained something adverse to the interests of the party producing it. We are of opinion that no sufficient ground is laid for supposing any thing of the sort, and inasmuch as that part of the presentment which related to the boundary in question was in itself perfect, we cannot see any reason for rejecting this document, and think that it was properly admitted.

The third ground was that the verdict was against the evidence. (On this point his Lordship said that the case was one entirely for the jury, and that the Court could not say they had drawn a wrong conclusion.)

Rule refused (2).

(1) 4 M. & W. 320.

(2) See *Brett v. Beales*, 34 R. R. 499 (M. & M. 416). It is observable, that in *Reed v. Jackson*, 6 R. R. 283 (1 East, 355), the verdict of the jury on the plea of a public right of way, which was admitted to prove the non-exist-

ence of such way, seems to have been entered for the plaintiff without any evidence at all, the contest on the trial having been confined to another plea alleging a right to enter for the purpose of washing sheep.

REG. v. LUMSDAINE.

(10 Adol. & Ellis, 157—161; S. C. 2 P. & D. 219; 1 W. W. & H. 587; 8 L. J. (N. S.) M. C. 69; 3 Jur. 360.)

1839.
April 27.
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The Parochial Assessment Act, 6 & 7 Will. IV. c. 96, does not alter the law as to the rateability of personal property; therefore a poor rate made after the statute, omitting stock in trade which yields a profit in the parish, is liable to be quashed on appeal.

On appeal against a rate, made June 2nd, 1838, for the relief of the poor of the parish of Wimborne Minster, in Dorsetshire, the Sessions confirmed the rate, subject to the opinion of this Court on the following case.

The rate, which was in the form prescribed by stat. 6 & 7 Will. IV. c. 96, and the rules of the Poor Law Commissioners, was published as required by the statute. No stock in trade was rated in the said rate: there was considerable stock in trade yielding profit in the said parish at the time when the rate was made. The parish contains 12,000 acres, or thereabouts, rateable to the relief of the poor. In the year 1833, stock in trade not having been included in a rate made on the 3rd of May of that year for the relief of the poor of the said parish, an appeal was entered at the then ensuing Midsummer Sessions, on the ground that stock in trade, yielding profit within the parish, was not included in the said rate. The hearing of the appeal was adjourned to the then next Sessions, when the respondents abandoned the said last-mentioned rate, and it was quashed, and a new rate was made on the 28th of February, 1834, in which stock in trade was assessed from that time. Stock in trade continued to be regularly rated in the said parish down to the month of June, 1835, inclusive. It appeared from the rate-books of the said parish that stock in trade had not been rated therein from the year 1796 until the said *rate of February, 1834, and there was no evidence of stock in trade having been rated in the parish previously to 1796. Stock in trade has not been assessed in the said parish since the month of June, 1835. The question for the consideration of this Court was, whether stock in trade yielding profit in the said parish ought or ought not to have been assessed in the said rate made on the 2nd of June, 1838, and if this Court was of the former opinion, then the order of Sessions and the rate were to be quashed.

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Sir John Campbell, Attorney-General, *Stock*, and *Reade*, in support of the order of Sessions:

There has been no express decision, upon argument, that stock

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in trade is rateable. Lord MANSFIELD inclined against the rateability, and the Court has questioned it in some instances, though it has been reluctantly allowed in others: *Rex v. Witney* (1), *Rex v. Ringwood* (2), *Rex v. Ambleside* (3), *Regina v. Barking* (4).

(PATTESON, J.: Shipping has been constantly rated. There have been cases at Liverpool, Holyhead, Wisbeach, and elsewhere, in which such rates have been held maintainable (5).)

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At all events the Parochial Assessment Act, 6 & 7 Will. IV. c. 96, determines the point. It is inconsistent with the continued rateability of personal property, and therefore abrogates *pro tanto* the statute 43 Eliz. c. 2. It gives a form in which rates shall be allowed for the future, and that form does not provide for a rate on any property except real property and corporeal "hereditaments" (6). And the *Act expressly legislates for parish assessments generally, and not merely for part of the objects of assessment. As the Courts have narrowed the construction of stat. 43 Eliz. c. 2, which is in terms general enough to include all inhabitants in respect of any personal property, so the Parochial Assessment Act further interprets and restrains the statute of Elizabeth, and excludes personal property from its operation. Even affirmative words in a later statute may restrain a former one: *Foster's case* (7), *Slade v. Drake* (8), *Rex v. Coode* (9), *Rex v. Justices of Worcestershire* (10).

(COLERIDGE, J.: Section 2 of stat. 6 & 7 Will. IV. c. 96, only provides that the rate shall contain the particulars mentioned in the form, "in addition to" the other particulars required in the rate.)

That refers, not to any additional subject of a rate, but to additional particulars respecting the hereditament rated. The proviso in sect. 1, preserving the relative proportions of liability between different kinds of hereditaments, was introduced in consequence of *Rex v. Joddrell* (11), and has no reference to personal property. At

(1) 5 Burr. 2634.

(2) Cowp. 326.

(3) 16 East, 380.

(4) 2 Ld. Ray. 1280.

(5) See *Rex v. Liverpool*, 8 East, 455, n.; *Rex v. Jones*, 8 East, 451; *Rex v. Shepherd*, 1 B. & Ald. 109.

(6) Sects. 1, 2, 3, and the schedule,

were referred to on this point.

(7) 11 Co. Rep. 56 b.

(8) Hob. 295, 5th ed. See p. 298.

(9) Cald. 464; S. C. 1 Bott. 307, pl. 290, 6th ed.

(10) 17 R. R. 397 (5 M. & S. 457).

(11) 1 B. & Ad. 403.

all events, the rate exactly follows the prescribed form, and therefore it is *ex facie* good, and cannot be quashed.

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(LORD DENMAN, Ch. J.: The rate in another form may be bad, but it does not follow that every rate in that form is good.)

Bond and Lucena, contra, were not called upon.

LORD DENMAN, Ch. J.:

It is not improbable that the Legislature intended to alter the law upon the subject *of rating personal property; but I am clearly of opinion that the intention has not been carried into effect. The object of the Act does not appear to have been to introduce any new principle of rating, but to affirm that which had been already established by decisions of this Court. The form given in the schedule certainly contemplates only the rating of corporeal hereditaments, and this is urged as a declaration of the law by Parliament upon a point which is suggested to have been before doubtful. There has, however, existed a known and long established practice of rating personal property in many cases, and the legality of such rates has been affirmed by this Court. The law, therefore, is not to be altered except by express enactment. We cannot, in such a case, admit it to be repealed by implication, where the Legislature might so easily have repealed it in direct terms.

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LITLEDAL, J.:

Stat. 43 Eliz. c. 2, s. 1, embraces two classes of persons subject to taxation; occupiers of real property, and inhabitants in respect of personal property. Hitherto rates upon the latter class have been in practice confined to stock in trade and shipping; but on future occasions other kinds of personal property may perhaps be rated, and be held rateable. The provisions of this Act apply only to the former class of rateable objects, and leave the second at large as before. There is nothing that amounts to a repeal of the law on this head, nor can the Act be considered as a declaratory one.

PATTESON, J.:

Personal property is rateable if visible and profitable, and this Act points at no repeal of the existing law. The provision respecting the uniform *mode of rating evidently points at the decisions in *Rex v. Joddrell* (1) and similar cases.

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COLERIDGE, J. :

We are told that we must collect from the Act an intention to alter stat. 43 Elizabeth, c. 2 ; but this cannot be done. The Court has always regarded personal property as being within the operation of that statute. The reluctance with which the rateability of it has been admitted by the Court, only tends to strengthen the argument in favour of the rate ; and the silence of the Act as to the mode of rating one species of property, is evidence that it points only at the other.

Orders quashed.

1839.
May 23.

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NORRIS v. SMITH (1).

(10 Adol. & Ellis, 188—193 ; S. C. 2 P. & D. 353 ; 8 L. J. (N. S.) Q. B. 274.)

Where a clause in a statute (50 Geo. III. c. cxlix. s. 105, local and personal, public) required thirty days' notice of action for anything done in pursuance of it, and enabled the party complained of to tender amends for any irregularity : Held, that a letter written to the defendant, who justified under the Act, requesting him to communicate the names of certain parties, and stating that, unless the request was complied with, the plaintiff would "take proceedings against him accordingly," was an insufficient notice within the statute.

The Act authorised trustees, upon complaint of any inhabitant, and "due investigation," to order "any pigstye, necessary, or nuisance," in or near the streets, &c., to be removed within seven days after notice in writing to the occupier of the premises wherein such nuisance was situate. The trustees issued such a notice to the plaintiff, imputing that he kept a brothel, and ordering him to discontinue such nuisance. Plaintiff thereupon brought an action, as for libel, against the clerk who signed the notice : Held, that he was entitled to notice of action under the above clause, although it did not appear that there had been either complaint or investigation before the issuing of the order.

Semble, a brothel is a nuisance within the meaning of such an enactment, per Lord DENMAN, Ch. J., at Nisi Prius.

CASE for a libel, imputing to plaintiff that he kept a disorderly house, to the common nuisance, &c.

Plea : Not guilty (by statute).

The cause was tried at the sittings in Middlesex after last Easter Term, before the Lord Chief Justice. The alleged libel was contained in a notice, signed by defendant as clerk of the trustees under stat. 50 Geo. III. c. cxlix. (local and personal, public), for lighting, watching, &c., the streets in the parish of St. Luke, Middlesex, and left at the plaintiff's dwelling-house. It purported to be a notice under sect. 105 (2) of the statute, reciting a *complaint to the trustees

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(1) See now the Public Authorities c. 61).—R. C.
Protection Act, 1893 (56 & 57 Vict. (2) Sect. 105 is as follows : " In

against plaintiff for keeping a brothel frequented by persons of ill fame of both sexes; and requiring him forthwith to abate and discontinue such nuisance, otherwise that the trustees would proceed to cause him to be indicted, in pursuance of the statutes in that behalf. More than thirty days before the commencement of the action, plaintiff's attorney wrote the following letter to defendant.

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35, CASTLE STREET, HOLBORN, 4th August, 1838.

SIR,—I am directed by Mr. John Norris of P. Street to request you will forthwith give up the names of the person or persons said to have made a complaint to the trustees for lighting &c. the parish of St. Luke, and upon which you did, on the 23rd July last, serve Mr. Norris with a notice charging him with keeping a disorderly house &c.; and, unless you do, Mr. Norris will consider you the author of such notice (which I conceive to be libellous), and will take proceedings against you accordingly. Probably you will favour me with the names of the gentlemen, said to be trustees, who, in your company and presence, forcibly entered Mr. Norris's house. An answer is requested.

I am, Sir,

W. H.

To this letter defendant returned for answer that he would "be happy to receive any proceedings" which plaintiff might be advised to take against him, but declined to give the names, alleging that

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case, in any part or parts of the said parish, any hogstye, necessary-house, or nuisance shall be in or near any of the streets, squares, ways, roads, lanes, courts, passages, or public places within the said parish, it shall be lawful for the said trustees, upon complaint thereof to them made by any such inhabitant, and after due investigation of such complaint, by notice in writing under the hand or hands of their clerk or clerks for the time being, to order that any and every nuisance or nuisances, offence or offences, shall be forthwith remedied or removed, and if the same shall not be remedied or removed within seven days after such notice given to the owner or owners, occupier or occupiers, of the premises wherein such nuisances shall be situate, or left for him or them at

his or their last or usual place or *places of abode, it shall and may be lawful to and for the said trustees to indict, or cause to be indicted, such person or persons so neglecting or disobeying such notice or notices, at the next General or Quarter Sessions of the peace for the county of Middlesex, for such nuisance or nuisances; and such person or persons being found guilty thereof, such nuisance or nuisances shall or may be removed, taken down, and abated, according to law with regard to public or common nuisances." There is a similar provision in the Metropolis Paving Act, 57 Geo. III. c. xxix. s. 67 (local and personal, public), which was also relied upon by the trustees, but of which no notice was taken in the argument.

[*189, n.]

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he did not know who they were, and, if he did, would not communicate their names. No complaint to, nor investigation by, the trustees, previous to the above notice, was proved on the part of defendant. It was objected that a notice, issued under the above circumstances, was not actionable; and that no notice of action had been given as required by the statute (1). On the other side, it was

(1) *Beechey v. Sides*, 33 R. R. 333 (9 B. & C. 806), was cited. See *Lidster v. Borrow*, 9 Ad. & El. 654, and the cases there cited. The following sections of the Act were referred to.

[*191, n.]

Sect. 170. "No plaintiff or plaintiffs shall recover in any action to be commenced against any person or persons for any thing done in pursuance of this Act, unless notice in writing of such intended action shall have been given to the clerk or clerks of the said trustees, or left at his or their last or usual place or places of abode, twenty-one days before such action shall be commenced, signed by the attorney for the intended plaintiff or plaintiffs, specifying the cause or causes of such action; nor shall any plaintiff or plaintiffs recover in such action for satisfaction for special damage or otherwise, or for any such irregularity, trespass, or other proceedings, if tender of sufficient amends shall be made by or on the behalf of the party or parties who shall have committed, or cause to be committed, every or any such irregularity, trespass, or wrongful proceeding, before such action shall be brought," &c.

Sect. 173. "No action or suit shall be commenced against any person or persons for any thing done in pursuance of this Act, until after thirty days' notice in writing shall be thereof given to the clerk or clerks to the said trustees, or after sufficient satisfaction made or tendered, or after six calendar months next after the fact committed, for which such action or actions, suit or suits, shall be so brought; and all such actions or suits shall be laid and tried in the county of Middlesex, or city of London, and not in any other county, city, or place; and that the defendant or defendants in such

action or actions, suit and suits, and every of them, may plead the general issue, and give this Act, and the special matter, in evidence, at any trial or trials which shall be had thereupon; and that the matter or thing for or on which such action or actions, suit or suits, shall be brought, was done in pursuance, and by the authority, of this Act; and if the said matter or thing shall appear to have been so done, or if it shall appear that such action or suit was brought before twenty-one days' notice was given as before directed, or that sufficient satisfaction was made or tendered or paid into Court as aforesaid, or if any such action or suit shall not be commenced within the time before for that purpose limited, or shall be laid in any other county, city, or place than as aforesaid, then the jury shall find for the defendant or defendants therein; and if a verdict shall be found for such defendant or defendants, or if the plaintiff or plaintiffs in such action or actions, suit or suits, shall become nonsuited, or suffer a discontinuance of such action or actions, suit or suits, or if upon a demurrer or demurrers in such action or actions, suit or suits, judgment shall be given for the defendant or defendants therein; then, and in either of the cases aforesaid, such defendant or defendants shall have treble costs, and shall have such remedy and remedies for recovering the same, as any defendant or defendants may have for the recovery of his, her, or their costs in other cases by law."

Whether twenty-one, or thirty, days' notice was necessary, was a question which the Court adverted to, but found it unnecessary to determine.

*contended that the Act did not apply to nuisances of the kind mentioned in the supposed libel: that the letter of plaintiff's attorney was a sufficient notice; and that there was strong evidence of want of *bona fides* in the proceeding of the trustees. The LORD CHIEF JUSTICE was of opinion that the statute applied to nuisances of this kind, and directed the jury to find for the defendant on the ground that there was no sufficient notice of action, with liberty to move to enter a verdict for plaintiff, with nominal damages.

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Erle now moved to enter a verdict for the plaintiff:

The defendant, who relies on the order of the trustees, must stand in their place, and cannot justify, because they could not have justified. There was no complaint, nor any investigation by them before they issued the notice.

(LORD DENMAN, Ch. J.: I held that the order, though it might be irregular, was, at all events, sufficient to entitle the defendant to notice of action.)

The letter *by the plaintiff's attorney on 4th August was a sufficient notice. The Act does not require such particularity in the notice as stat. 24 Geo. II. c. 44, s. 1, does in the case of justices, but merely a general notice of action.

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LITLEDALE, J.:

The notice required is certainly not so particular as is necessary in proceeding against magistrates; but this notice is insufficient. In *Leicis v. Smith* (1) a letter, notifying the party's intention "to take legal measures" if certain goods were not delivered forthwith, was held insufficient by Ch. J. GIBBS under a similar provision. The refusal to give up the names should have been followed by a distinct notice of action, to which the defendant, who stands in the situation of the trustees in this respect, is clearly entitled, where the act complained of was done *bonâ fide*.

PATTESON, J.:

The order issued by the trustees professed to be a proceeding under the Act; and there is enough to show that it was taken *bonâ fide* in pursuance of the Act. The defendant was therefore entitled to a proper notice. Here the letter was sent without reference to the statute. It is only a conditional notice, not an absolute one; and it makes no allusion to the period of time at the end of which an

(1) Holt, N. P. 27.

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action is to be commenced, and during which the defendant is to have an opportunity of tendering amends.

WILLIAMS, J. :

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The question is, not whether the defendant and the trustees were strictly justified by the provisions of the statute, but whether there was a semblance of acting under it. If there was, the defendant *is entitled to such a notice as will induce him to tender amends, where the Act has not been strictly pursued.

LORD DENMAN, Ch. J. concurred.

Rule refused.

1839.
May 24.
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DOE D. OXENDEN v. CROPPER.

(10 Adol. & Ellis, 197—203; S. C. 2 P. & D. 490; 8 L. J. (N. S.) Q. B. 241; 3 Jur. 578.)

An ejectment, brought for close A. and close B., was referred at Nisi Prius to an arbitrator, together with an action for trespass upon close B., brought by the lessor of the plaintiff against the same defendant. In the action of trespass there were special pleas justifying on the ground of title to close B. in defendant. The arbitrator ordered a verdict on all the issues in trespass for the defendant, except one issue on a plea of Not guilty; but he ordered a general verdict for the plaintiff in the ejectment. By a paper which he delivered with the award, stating his reasons, it appeared that he considered that the lessor of the plaintiff had no title to close B.

Held that, though there appeared a repugnancy, the *postea* in the ejectment could not be amended by confining it to close A., and that the lessor of the plaintiff was entitled to retain the general verdict.

FROM the affidavits in this case it appeared that the ejectment was brought to recover a close called Little Becks, and also the house and land which were the subject of the two following agreements, and for no other lands &c.

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By memorandum of agreement, dated July 8th, 1831, between Cropper and Oxenden, Cropper agreed to let, and Oxenden to take, at a certain rent, the house and land therein mentioned, for three years from 13th May then last, with liberty to Oxenden to continue the possession for five or seven years, on stating his determination so to do, in writing, six months before the expiration of the three years. By memorandum of agreement *dated May 14th, 1832, between the same parties, Cropper agreed to sell and Oxenden to purchase the same house and land at a price named.

Little Becks formed no part of the property mentioned in the two agreements, but had been let by Cropper to Oxenden in May,

1833. Cropper retook possession of Little Becks about March, 1834: and, Oxenden having failed to complete the purchase contracted for by the agreement of May, 1832, Cropper also entered into possession of the house and land which was the subject of that agreement, in February, 1835.

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For the entry in February, 1835, Oxenden brought an action of trespass against Cropper; but, in that action, no claim whatever was made respecting Little Becks. Cropper pleaded several pleas of soil and freehold, as to the house and land, in himself and others; and, as to certain property therein, he pleaded property in himself and others; and also, to the whole declaration, Not guilty. Oxenden replied, to the pleas of soil and freehold, a demise to him by Cropper of 14th November, 1832, traversed the pleas of property, and joined issue on the plea of Not guilty. Cropper traversed the demise, and joined issue on the traverse in the replication: and Oxenden joined issue on the traverse in the rejoinder.

The actions of ejectment and trespass came on to be tried at the Lincolnshire Summer Assizes, 1837, before Park, J.; when, by an order of Nisi Prius, it was ordered, by consent &c., that a juror should be withdrawn in the ejectment, and a verdict be entered for the plaintiff in *Oxenden v. Cropper* (the action of trespass) for 1,000*l.* damages, subject to the award of a barrister, who should be at liberty to order and direct for whom and for what sum the verdict should be finally entered, *and to direct a verdict to be entered in the ejectment as he might think right; and he was to settle all matters in difference between the said parties in both causes, and to order and determine what he should think fit to be done by either party respecting the matters in dispute, who agreed to be bound and concluded by such determination: the costs of each cause to abide the event of the award, and the costs of the reference and all other costs to be in the discretion of the arbitrator. And, by the like consent, the defendant was, at all events, to retain possession of the premises in question, and Oxenden was to release all right and interest therein that he might have: and the arbitrator was to say what compensation, if any, was to be paid by the defendant to Oxenden in respect of any money he might have expended upon the premises agreed to be purchased by Oxenden of defendant.

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The arbitrator made his award, the material part of which is as follows. "I do award," &c., "that a verdict be entered in the said first-mentioned cause, that is to say in the action of ejectment, for

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the plaintiff, with 1s. damages; and I do further award," &c., "that upon all the issues joined in the said last-mentioned cause, that is to say the action of trespass, except the issues joined on the last plea in the said last-mentioned cause, the verdict be finally entered for the defendant; and that, upon the issue joined on the said last plea, that is to say the plea of Not guilty, the verdict be finally entered for the plaintiff. And I," "having duly heard and considered the claims made by the said Henry Chudleigh Oxenden upon the reference of all matters in difference, and particularly the claim made by him to compensation for money expended by him upon the *above-mentioned premises at Laceby" (the subject of the agreement to purchase), "and also the claims made by the said Robert Cropper against the said Henry Chudleigh Oxenden, upon the reference of all matters in difference between the said last-mentioned parties," "do award," &c., "that nothing shall be paid by either of the said last-mentioned parties to the other of them in respect of such claims."

At the time of the award being taken up by the defendant, the arbitrator delivered to him a paper writing, of which the material part is as follows. "If either party should desire to know the grounds upon which I have proceeded in making my award, they are as follows. I am of opinion that, if, previous to the expiration of the agreement for three years in May, 1834, the contract for the purchase had been put an end to, the parties, according to the doctrine in *Doe v. Stanion* (1), would have been remitted to their original rights, and the tenancy would have revived and have continued until the expiration of the agreement; but that, when the agreement expired, nothing occurred upon which a new contract upon the terms of the old one for a tenancy from year to year could be implied. It was, I think, clear that neither party contemplated a tenancy from year to year from that time; and that Mr. Oxenden was permitted to continue in possession of the premises mentioned in the declaration in trespass solely on the footing of the proposed purchase; and that he was in the same situation as if he had then taken possession under the purchase contract. With respect to the

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Little Becks, I think there was fully sufficient evidence *of a tenancy from year to year, not determined by notice at the time the possession was resumed by the defendant; and that, consequently, the ejectment might be maintained to recover the Little Becks. I am of opinion that the purchase did not go off from any defect of title in, or default of, the defendant, but in consequence of the

(1) *Doe d. Gray v. Stanion*, 46 R. R. 464 (1 M. & W. 695; Tyr. & Gr. 1065).

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inability of the plaintiff to complete the purchase : and, under such circumstances, I am not aware of any rule of law or equity by which the defendant could be required to pay back money laid out upon the premises without his consent or privity." He then added other reasons, not material here, for his not allowing the expense of the improvement. It was deposed that the only points in dispute before the arbitrator in the ejectment, were, whether the tenancy of Little Becks was from year to year, and whether it continued on the day of the demise, 4th February, 1835, and whether Oxenden was tenant from year to year, or at will or sufferance, under the two agreements or otherwise.

The *postea* in the action of ejectment was entered Guilty, generally.

Whitehurst, on affidavit of the above facts, now moved that the *postea* might be amended by confining it to Little Becks (1). It is clear that the arbitrator considered the defendant entitled to the possession of all but Little Becks, both from the award as to the action of trespass, and from the language of the document *which he delivered with the award. In ordinary cases of verdict, the Court has power to amend the *postea* according to the true intent of the jury : and, though this is usually done by the Judge who tries the cause, yet, strictly speaking, he is only a commissioner ; and the real power is in the Court. Then the same rule must be applied to cases where the *postea* is the result of an award. In *Kent v. Elstob* (2) the COURT, discovering, from a paper delivered by the arbitrator, as here, together with the award, that he had mistaken the law, set the award aside. *Sharman v. Bell* (3) may be cited for a contrary doctrine : but there the grounds of the arbitrator's decision were collected only from his conduct on the arbitration. But in a very late case, *Jones v. Corry* (4), where an arbitrator had stated his reasons verbally, after the publication of the award, in order to enable the parties to apply to the Court, the COURT, considering the reasons bad, set aside the award. A notion at one time prevailed that a plaintiff in ejectment, if he proved his case for any part of the land, was entitled to a general verdict, though, at his own risk, he

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(1) He also moved that the Master should tax the costs for the defendant, or at any rate not for the plaintiff, as to all except Little Becks ; but, it not appearing that any taxation had hitherto taken place, the COURT said that they could not presume that the

costs would be taxed erroneously ; and that the motion was therefore so far premature.

(2) 6 R. R. 520 (3 East, 18).

(3) 17 R. R. 419 (5 M. & S. 504).

(4) P. 652, below (5 Bing. N. C. 187).

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r.
CROPPER.

was bound to confine the execution to the part for which he had proved.

(LORD DENMAN, Ch. J.: A general verdict does not bind for all claimed: but, where the evidence confines the case to a part, the verdict may be for such part.)

[*203]

In *Doe d. Errington v. Errington* (1) COLERIDGE, J. said, "The action of ejectment in form complains of an unlawful ouster, usually from several messuages or closes, and the plea of not guilty puts in issue an ouster from any one of them. The issue, therefore, is formally and substantially divisible. It is *very possible, that as to one or two messuages the ouster may be unlawful, and as to the residue lawful, and there is nothing to prevent a finding by the jury of such an ouster as to some or one of the messuages or closes, and negating it as to the residue." Here the question is very important as affecting the costs.

Humfrey showed cause in the first instance:

The arbitration rule gives the defendant the possession, at all events: so that nothing can be affected except the costs. *Doe d. Bryant v. Wipple* (2) shows that, under a demise of the whole, an undivided moiety may be recovered. Here the award, if objectionable at all, must be so on the ground of repugnancy. (He was then stopped by the COURT.)

LORD DENMAN, Ch. J.:

There is an apparent repugnancy, on looking at the matters now brought before the Court; but you have a general verdict, and are entitled to keep it.

LITTLEDALE, PATTESON, and WILLIAMS, JJ., concurred.

Rule refused.

1839
May 24.
[204]

HALL v. BUTLER AND ANOTHER.

(10 Adol. & Ellis, 204—207; S. C. 2 P. & D. 374; 8 L. J. (N. S.) Q. B. 239.)

N., having no title to certain premises, let them by parol, and received rent. Afterwards another claimant, B., demanded the rent; and N., being satisfied with B.'s title, informed his tenant, in B.'s presence, that he had given up the premises to B. who was now the landlord, and that the

rent was thenceforth to be paid to B. The tenant acquiesced; and, when B. demanded the next quarter's rent, paid part of it on account. Held, that the tenant could not afterwards set up the title of a third claimant who had demanded rent, but had taken no step to eject him; no deception by any of the parties having been suggested.

HALL
v.
BUTLER.

REPLEVIN. Avowry for rent due from plaintiff as tenant to defendant, Butler. Plea, *non tenuit*.

On the trial before the Recorder of Chester, the defendants proved a will of Joseph Butler (whose heir defendant Butler was), dated 8th August, 1783, by which he devised the premises in fee to his daughter Elizabeth, who afterwards married one Nevitt, and died in 1828, without having had issue. Nevitt continued to receive the rent after his wife's death; and plaintiff entered at Lady Day, 1834, under a yearly tenancy by a written demise from him not under seal. At Christmas following Nevitt received the rent. After this, and before the next Lady Day, defendant Butler laid claim to the premises as heir-at-law of Mrs. Nevitt, deceased, and demanded rent of plaintiff. Whereupon plaintiff went with him to Nevitt, and was then informed by Nevitt that he had given up the premises to defendant Butler, who was now to be his landlord; and that the rent was thenceforward to be paid to defendant Butler. Plaintiff acquiesced in this; and, when the rent was due at Lady Day, 1835, paid to defendant Butler 6s. 6d. on account. Plaintiff afterwards, and before further payment by him, received notice from another claimant, Daniel Butler, to pay rent to him, and thereupon refused to pay it to any body until the dispute was settled. Defendants then distrained on plaintiff. At the trial, the plaintiff offered in evidence a deed of settlement prior to the will of 1783, to show that the premises in question were leasehold; that Daniel Butler was entitled to a share of them under that settlement; and that the *defendant Butler never had any title. The Recorder directed the jury to find a verdict for defendants, giving leave to move to enter a verdict for the plaintiff, or for a new trial. *Townsend* obtained a rule accordingly.

[*205]

W. H. Watson now showed cause:

Nevitt, not being tenant by the curtesy, had no title whatever after his wife's death; and he and his tenant might have been ejected forthwith. Being satisfied with the title of the defendant Butler, he authorised his tenant to become the tenant of the defendant. The legal effect of this was either an adoption by the defendant Butler of Nevitt's demise to the plaintiff, whereby the

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v.
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plaintiff became the tenant of the defendant *ab initio*; or a fresh demise by the defendant to the plaintiff upon the disclaimer of Nevitt. In either case, the plaintiff cannot now dispute the defendant's title. This is not a mere attornment under mistake, as in *Cornish v. Searell* (1), where the attornment was to sequestrators who had, in fact, no legal title. The case differs from those in which the tenant's possession was originally a lawful one, and where the only question was, to whom the rent was to be paid.

Townsend, contra :

[*206]

The plaintiff was induced to attorn to the defendant Butler by Nevitt's misrepresentation. It was, therefore, an attornment in ignorance of the real title, which was in Daniel, and not in the defendant. The distinction between receiving possession from one who has no title, and merely attorning by mistake to such a person, is noticed by BAYLEY, J. in *Cornish v. Searell* (2), which is quite in point. The defendant Butler does not claim under Nevitt; but Nevitt disclaims his own title as landlord, and represents the defendant as the party *justly entitled. The defendant attorns upon the faith of that statement, which turns out to have been incorrect. Under such circumstances, the tenant may call in question the defendant's title: *Rogers v. Pitcher* (3), *Fenner v. Duplock* (4), *Gregory v. Doidge* (5), *Hopcraft v. Keys* (6), *Doe d. Plevin v. Brown* (7). The last case is very much like the present. If, then, proof of the real title is admissible, it disproves the tenancy under the defendant Butler, and is evidence on the issue of *non tenuit*.

LORD DENMAN, Ch. J. :

Nevitt, who let the plaintiff into possession, and whom the plaintiff was therefore bound to acknowledge as his landlord, informs him that the premises belong to the defendant Butler, and that the rent is to be thenceforward paid to the latter, who demands it accordingly, and receives part of it. This is either a ratification of the demise by Butler, or is a fresh demise by him. In either case the same consequence follows; viz. that the title of the defendant Butler cannot be disputed by the tenant. As no deception or

(1) 32 R. R. 445 (8 B. & C. 471).

(2) 32 R. R. 448 (8 B. & C. 475).

(3) 6 Taunt. 202.

(4) 27 R. R. 537 (2 Bing. 10).

(5) 3 Bing. 474.

(6) 35 R. R. 644 (9 Bing. 613).

(7) 7 Ad. & El. 447.

misrepresentation was intended by Nevitt, or by the defendant Butler, the case falls within the ordinary rule.

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v.
BUTLER.

LITLEDALE, J. :

I entertain some doubts on the case ; but on the whole it seems to fall within the rule. The legal effect of the arrangement is, that the plaintiff may be considered as having become tenant to the defendant Butler under a fresh taking from Christmas : and the avowry is therefore proved.

PATTESON, J. :

There is a distinction between disputing the title of one who has actually let the party into *possession, and of one who, afterwards, claims to be entitled. In the latter case the tenant may generally dispute it by showing title in another. Here the effect of the arrangement in 1834 is rather a question of fact than of law. I am not sure that it may not be considered as an original taking from Butler himself ; for Nevitt treats himself as the agent of Butler, who adopts the demise. But, at all events, Nevitt disclaims title in himself, and points out Butler as the real landlord ; the plaintiff acquiesces, and consents to the new holding ; and there is no evidence of any attempt to eject him by the party whose title he now attempts to set up.

[*207]

WILLIAMS, J. concurred.

Rule discharged.

WHITEHEAD v. TAYLOR.

(10 Adol. & Ellis, 210—213 ; S. C. 2 P. & D. 367 ; 4 Jur. 247.)

A cognizance by defendant as bailiff of an executor, for rent due to the testator, is supported by proof of a distress by him in the name of the testator and by his direction, but after his death ; such distress, though made before probate, having been afterwards adopted and ratified by the executor.

1839.
May 25.

[210]

REPLEVIN. Cognizance by defendant as bailiff of Mary H., executrix of John H., for a year's rent due in the lifetime of John H., in respect of premises held and enjoyed by plaintiff as tenant to the said John, the plaintiff continuing in possession thereof under the demise after the death of the said John, until, at, and after, the said time when &c. Profert of letters testamentary. Plea, that defendant, at the said time when &c., was not the bailiff of Mary H., in manner and form &c. Issue thereon.

WHITEHEAD
v.
TAYLOR.

[*211]

On the trial of the cause before Lord Denman, Ch. J., at the Middlesex sittings after Easter Term, it appeared that the defendant, a broker, was directed by the testator to distrain on the plaintiff; that the testator died just *before the distress was taken; and that the executrix neither withdrew the distress, nor gave any fresh authority to distrain, but recognised and adopted it. His Lordship directed a verdict for the defendant, giving liberty to move to enter it for the plaintiff.

Jervis now moved in pursuance of the liberty reserved:

The death of the testator revoked the authority of the defendant. At the time of distress he was the bailiff, not of the executrix, but of the testator. Having distrained in one name, he cannot now avow in the name of another, though he might have distrained and avowed for different things. It is true that if a distress is taken in the name, but without the authority, of a stranger, the latter may ratify the agency and make it good *ab initio*. But here the defendant was properly authorised to distrain by one whose authority was afterwards revoked by death. The tenant can look only at the authority in force at the time when the distress is made. Finding it to be a defective one, he must replevy; otherwise his property may be sold, and yet the rent remain unsatisfied. Having replevied, he is bound to prosecute his suit. Under such circumstances it would be unjust that the subsequent ratification of a third party, not entitled at the time of the distress, should be set up to defeat the action. Besides, the executrix, whose power both of action and distress is given by stat. 32 Hen. VIII. c. 37, s. 1 (1), can support neither the one nor the other before probate; and therefore cannot ratify a distress made before probate.

Cur. adv. vult.

[212]

On a subsequent day in this Term (Wednesday, 12th June), judgment was given by

LORD DENMAN, Ch. J. (After stating the pleadings, his Lordship proceeded:)

The evidence showed that the testator had given the defendant authority to distrain, but died almost immediately, before the distress was taken. After it had been taken in the testator's name, the executrix fully recognised and adopted the defendant's act of

(1) See now stat. 3 & 4 Will. IV. c. 42, s. 37; 2 Williams on Executors, 669 (ed. 2), Part III. Book I. ch. i.

distraining. It was objected that, by the testator's death, the authority was revoked; that the executrix had no power to distrain before probate, because she could not maintain an action for the rent at that time; and that the distress, being made in the name of one whose authority had expired with his life, could not be ratified by his executrix afterwards.

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TAYLOR.

We are of opinion that both these objections are removed by the principle of relation.

1. The rent was due to the estate; and the law knows no interval between the testator's death and the vesting of the right in his representative. As soon as he obtains probate, his right is considered as accruing from that period. If an action, indeed, be brought in that interval, he cannot proceed to declare, because he must make profert of the letters testamentary in his declaration; but that reason does not apply to a distress, or any other act performed in assertion of his right as executor (1).

2. The executrix could ratify the act of the defendant, as testator's bailiff, though his authority was at an end; for she might have ratified the act of an entire stranger, as appears by the decision of ANDERSON, Ch. J., in which *PERIAM concurred, in an *Anonymous* (2) case in Godbolt's Reports, cited in 4 Vin. Abr. 1, Bailiff, (D), pl. 7. Such ratification has been held to legalise a past act, even when given after action brought. We therefore think that there ought to be no rule.

[*213]

Rule refused.

BASTARD v. SMITH AND OTHERS.

1839.

(10 Adol. & Ellis, 213—217; S. C. 2 P. & D. 453; 8 L. J. (N. S.) Q. B. 244.)

[213]

The expense of a witness at Nisi Prius to translate and explain ancient records of a public nature, and to watch and explain the records produced by the opposite party, and the expense of searching for, and obtaining copies and translations of, such records to be used in evidence, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them.

The costs of the attendance of an officer of the Court of Chancery, to produce affidavits filed there, for the purpose of using them at a trial to check the testimony of the same deponents at Nisi Prius, will be allowed on taxation between party and party, though the opposite party has not been called upon to admit them.

ERLE obtained a rule in Trinity Term, 1838, to show cause why the Master should not review his taxation of the plaintiff's bill

(1) See 1 Williams on Executors, 172, &c. (ed. 2), Pt. I. Bk. IV. ch. i. § 2. (2) Godb. 109.

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SMITH.

of costs in this cause. The principal exceptions to the taxation were that he had allowed the following items with respect to two of the plaintiff's witnesses, namely, Samuel Anderson, the registrar of affidavits in Chancery, and Charles Devon, of the Chapter House, Westminster, a gentleman conversant with ancient records.

<i>Subpœna duces tecum</i> for Samuel Anderson, the registrar	£	s.	d.
of affidavits in Chancery, to produce the affidavits filed			
in the Court of Chancery, and fee	-	-	0 10 0
Copy thereof to serve on him, fo. 10	-	-	0 3 4
Service of <i>subpœna</i> on him in London	-	-	0 5 0
Paid his travelling expenses to and from Exeter, 176 miles	8	16	0
Paid him for his attendance at the Assizes seven days, at			
2 <i>l.</i> 2 <i>s.</i> per day	-	-	14 14 0
Service of <i>subpœna</i> on Mr. Charles Devon in London	-	0	5 0
Paid his travelling expenses to and from Exeter, 176			
miles (say half in this case)	-	-	4 8 0
Paid him for his attendance at the Assizes ten days, five			
days at 1 <i>l.</i> 11 <i>s.</i> 6 <i>d.</i> , and five days at 3 <i>l.</i> 3 <i>s.</i> per day (1)	23	12	6

[214]

The Master had further allowed a payment to Devon of 93*l.* 8*s.* 11*d.* for making searches for, obtaining office copies of, and translating, records intended to be proved at the trial on the part of the plaintiff.

The affidavits mentioned above were affidavits sworn by certain witnesses in a suit in Chancery between the same parties and upon the same subject, who, it was expected, would be produced as witnesses for the defendants at the trial of this cause. An order was obtained from the LORD CHANCELLOR for the production of these by Anderson; who accordingly attended the trial, solely for that purpose. The defendants had not been previously called upon to admit copies of them as directed by Reg. Gen. H. 4 Will. IV. s. 20. They were carried down to the Assizes by the plaintiff in order to check the testimony of the witnesses, and to enable counsel to cross-examine them; and they were actually used for that purpose on the trial; TINDAL, Ch. J., who tried the cause, having held that plaintiff's counsel had no right to cross-examine one of the witnesses on the contents of his own affidavit, and to use it afterwards, without putting the original into his hands to refresh his memory (2).

With regard to the payment to the witness Devon, it was objected that his attendance was only for the purpose of proving

(1) See *Serern v. Olive*, 23 R. R. 565
(3 Brod. & B. 72).

(2) See *The Queen's case*, 22 R. R.
662 (2 Brod. & B. 284).

and explaining copies and translations *of ancient charters and documents of a public nature from repositories at the Tower, Rolls' Chapel, &c., which every one was supposed to know and understand ; and that defendants had never been called upon to admit them agreeably to the rule of Court. They also objected that the expense of searching for documents was not properly an item of costs as between party and party, but between attorney and client.

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v.
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[*215]

On the part of the plaintiff it was stated, on affidavit, that the copies produced and proved by Devon were office copies of ancient records from the date of the Conquest down to that of Queen Elizabeth ; that Devon was subpoenaed, not only to prove such copies, but also to translate and explain them, and to watch and explain, if necessary, the documents, and translations of documents, of very early date, offered in evidence by the defendants, on the meaning of which there was some difference of opinion ; that the charge for searching and obtaining office copies was in respect of records which were actually found and intended to be used in the cause, and were material and necessary evidence for the plaintiff ; and that the last item was objected to before the Master only on the ground that it included charges of search for documents not found, or not intended to be used in the cause. 'It was also alleged that a book, relied upon by the defendants, called "Pearce's Stannary Laws," and which was actually offered in evidence at the trial and rejected by the Judge, was inaccurate ; and that one of the reasons for procuring the attendance of Devon was to prove such inaccuracy.

The issue in the action was on the existence of a custom for all tinnern in Devonshire to divert water, *and make leats through any lands in the county for the use of tin mines.

[*216]

Neither of the witnesses was in fact called ; nor were any of the above documents offered in evidence on the part of the plaintiff, inasmuch as the defendants were permitted to begin on the trial, and the plaintiff obtained a verdict without producing any evidence (1).

Sir John Campbell, Attorney-General, and *M. Smith* now showed cause, on the part of the plaintiff :

The rules on which the defendants rely are R. H. 2 Will. IV. vi. and vii. ; and Reg. Gen. H. 4 Will. IV. s. 20 ; but no one of them is applicable. With respect to the affidavits, mere copies, though admitted to be correct, would have been insufficient to

(1) See *Bastard v. Smith*, 2 Moody & Rob. 129.

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enable the plaintiff to cross-examine upon their contents, as was held at the trial. The original could be produced only in the hands of the proper officer. As to the other witness, he was subpoenaed, not solely to prove the accuracy of the copies, but also to translate and explain them, as well as to watch the documentary evidence produced on the other side. He was called to give oral evidence, as an antiquary, upon the ancient records, and might have been asked as to the result of his examination of them: *Rowe v. Brenton* (1). Besides, none of the rules apply to the case of a translation, which is, in fact, the oral evidence of the witness reduced to writing.

Erle, contra :

[*217]

The original affidavits were not necessary for the mere purpose of furnishing materials of *examination. Copies would have been sufficient, except to fix the witness with perjury (2). Then, as to the attendances and charges of Devon, the plaintiff cannot charge the defendants with precautionary measures, such as searching for evidence, and watching the proofs of the defendants. He was present as an adviser, rather than a witness.

(PATTESON, J. : Would you disallow the expense of an interpreter?)

The documents were all of a public nature, of which the defendants would have admitted copies, and which all people, or at least the Court, are supposed to understand.

LORD DENMAN, Ch. J. :

The cases are not within any of the rules referred to. It may, perhaps, be said that the translation of an ancient record is not a matter of fact which requires the production of a witness, and that the Judge should be able to translate and explain it to the jury ; but it is, at all events, convenient that such a person as Mr. Devon should be present to do so.

LITLEDALE, PATTESON, and WILLIAMS, JJ., concurred.

Rule discharged.

(1) 3 Man. & Ry. 212; S. C. (not S. P.) 8 B. & C. 737.

(2) But see *Highfield v. Peake*, Moo. & Mal. 109.

ROFFEY, ADMINISTRATOR OF ROFFEY, *v.* GREENWELL
AND ANOTHER, EXECUTORS OF STAPYLTON (1).

1839.
May 27.
[222]

(10 Adol. & Ellis, 222—225; S. C. 2 P. & D. 365; 8 L. J. (N. S.) Q. B. 336.)

A promissory note in this form, "I promise for myself and executors to pay F. H. or her executors, one year after my death, 300*l.* with legal interest," bears interest from the date of the note.

ASSUMPSIT on a promissory note given by defendant's testator to Frances M. Harris, deceased, for 300*l.* and interest. Defendants paid into Court 336*l.* 6*s.*, and pleaded that plaintiff had not sustained damages to a greater amount. Plaintiff replied further damages. Issue having been joined thereon, by consent and by a Judge's order, the following case was stated for the opinion of the Court.

On the 20th July, 1808, Stapylton, the testator, made a promissory note to Frances Harris, of which the following is a copy :

"NORTON, July 20th, 1808.

"I promise for myself and my executors to pay to Frances Mary Harris (or her executors) one year after my death 300*l.* with legal interest.

"300*l.*

"HENRY STAPYLTON."

The note was indorsed—

"To Frances Mary Harris, Merstham, near Ryegate, Surrey."

On 3rd October, 1808, Frances M. Harris married the plaintiff, Roffey. On or about 14th December, 1816, she died. On 21st August, 1835, Stapylton died, having by his will appointed defendants his executors, who duly proved the same. On 17th November, 1837, administration was granted to plaintiff of the goods and effects of his said late wife.

The question for the opinion of the Court was, whether *the plaintiff was entitled to recover, under the circumstances, more than the sum of 336*l.* 6*s.* paid into Court; and, if the Court should be of opinion that the plaintiff was entitled to recover more than the said sum, then judgment was to be entered against defendants, as executors, by confession, for such sum as the Court should direct. The case was argued in last Hilary Vacation (2).

[*223]

(1) See now the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 9 (3). L. R. 3 Ch. 691, 700, 37 L. J. Ch. 657, 662.—R. C.
And see above case referred to and distinguished by Sir W. PAGE WOOD, L. J., in *Mathews v. Keble* (1868) (2) February 6th, 1839. Before Lord Denman, Ch. J., Littledale, and Coleridge, JJ.

ROFFEY

v.

GREENWELL.

Platt, for the plaintiff:

Though there is no reported case exactly in point, the rule is, that a note, payable at a fixed time with interest, bears interest from the date of it: *Kennerly v. Nash* (1), *Doman v. Dibden* (2). In *Richards v. Richards* (3) the interest on a note, given by the maker to his own wife, was held to commence from the date of the note; and, as she could not sue on it until after her husband's death, it was, in effect, a note made payable after his death. It would be absurd to suppose that a note, expressly bearing interest, and presumably given for value, was intended to carry no interest during the maker's life, though he lived twenty years afterwards.

Erle, contra:

In the cases cited, the notes or bills were given for value received; and they appeared, either *aliunde* or on the face of them, to have been so given. *Richards v. Richards* (3) was a loan in the husband's lifetime. Here, though a consideration must perhaps be presumed, it need not be a pecuniary consideration, or one on which interest [*224] may be supposed to run, as *a loan; especially as the note does not profess to "bear" interest. No transactions or dealings between the parties are shown, to give probability to a claim of interest during the lifetime of the maker, who certainly could never have been himself called upon to pay any.

(LITLEDAL, J.: It looks like a voluntary gift in the nature of a legacy (4).)

Cur. adv. vult.

LORD DENMAN, Ch. J., now delivered the following judgment:

The question was, from what period interest should be computed on a note in the following form,—“I promise, for myself and my executors, to pay to Frances Harris (or her executors), one year after my death, 300*l.* with legal interest,”—no proof of the consideration being given.

It was admitted that no case in point could be found, nor any which lays down the rule, or principle, by which it is to be decided. Generally speaking, an instrument of this sort carries interest from its date, whether payable on demand, or at a time specified. The reason is, that the party, who makes the promise, must be expected

(1) 1 Stark. 452.

(2) 27 R. R. 761 (Ry. & Moo. 381).

(3) 36 R. R. 619 (2 B. & Ad. 447).

(4) See *Maxee v. Shute*, cited in *Masterman v. Maberly*, 2 Hagg. Ecc. Rep. 247.

to keep it; and, if he does, no interest can be due from any other period than the date.

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In the present case, there is indeed another period from which it might be computed, that of the maker's death: but it appears improbable that, if that was his intention, he should not have expressed it with more distinctness. We think, in the absence of all particular proof, that we must presume the note to have been given for value, *so that interest would be due from the date. If that be doubtful, the instrument ought to be construed most strongly against the maker. The plaintiff is therefore entitled to the larger sum; and judgment must be entered for it.

[*225]

*Judgment for the plaintiff for principal and interest
from the date of the note.*

DOE D. ELIZABETH EVANS v. HENRY EVANS.

(10 Adol. & Ellis, 228—236; S. C. 2 P. & D. 378; 8 L. J. (N. S.) Q. B. 284.)

1839.
May 28.

[228]

Testatrix devised lands to L. for life, remainder to his first and other sons and daughters successively in tail. L. died, leaving one son, and one posthumous daughter. The son died. Testatrix, being ignorant of the existence of the daughter, made a codicil, reciting the death of L. without leaving any issue, and devising the land to H., in the same manner as she had before done to L.: Held, that the codicil must be construed as a conditional revocation only, and was inoperative as against the daughter of L., though testatrix, after making the codicil, and two years before she died, had become acquainted with her existence.

IN an action of ejectment, tried at the Assizes for the county of Anglesey, a verdict was taken for the plaintiff, subject to the opinion of the Court upon the following special case.

Jane Jones, widow, being seised in fee of certain freehold premises, by her will, bearing date 28th July, 1819, and duly executed and attested to pass real estate, devised all her lands and tenements to certain trustees and their heirs, upon certain trusts therein mentioned as to part of her lands, not in question in this case, and, as to all the residue of her real estate (subject to the payment of an annuity to Richard Owen during his life), upon trust to the use of Lewis Evans of Holyhead, mariner, and his assigns, for and during the term of his natural life, without impeachment of waste; remainder to the said trustees, in trust to preserve contingent remainders; and, from and after his decease, to the use of the first and other sons of the said Lewis Evans, in tail; and, for default of

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issue in tail of such sons, to the use of the first and other daughters of the said Lewis Evans, in tail; and, for default of such issue in tail, to the use of her own right heirs for ever.

[*229]

On 27th May, 1829, the testatrix duly made the following codicil to her said will. Whereas, in and by my will, I have given the residue of my lands, &c. (subject to an annuity of 20*l.* to my cousin Richard Owen for his life), to the use of Lewis Evans, of Holyhead, and his assigns, for life; with remainder to his first and *other daughters in tail; with remainder to my own right heirs: and whereas the said Lewis Evans has since departed this life without leaving any issue; now I do hereby give and devise all the residue of my lands, &c., as mentioned in my said will (subject to the payment of the said annuity), unto and to the use of my relation Henry Evans, and his assigns, for the term of his natural life, without impeachment of waste. The codicil then proceeded to make the same settlement on the first and other sons of Henry Evans in tail, and, on failure of their issue, on his first and other daughters in tail, that she had previously made in favour of Lewis Evans and his issue.

Lewis Evans and Henry Evans were each related in the same degree to the testatrix, and were first cousins to each other.

Lewis Evans was married in 1818, and in 1820 had a son born. He died in September, 1821, leaving his wife pregnant with Elizabeth Evans, the lessor of the plaintiff, who was afterwards born, a posthumous child, in February, 1822. The son of Lewis Evans died in 1825. The testatrix, when she made the codicil to her will in 1829, did not know of the birth and existence of Elizabeth Evans, the daughter of Lewis Evans; but she became acquainted with those facts afterwards, in 1831, two years before her death. The testatrix died in 1833.

[*230]

The question for the opinion of the Court was, whether the codicil, made under the above circumstances, had the effect of revoking the devise of the residuary real estate in the will, under which devise the lessor of the plaintiff claimed the premises in question. If the Court should be of opinion that the codicil did not *revoke the devise in the will, but that the devise to the lessor of the plaintiff was a valid and subsisting devise at the time of the death of the testatrix, and that she was entitled under the same to the premises in question, then the verdict was to stand. But, if the Court should be of a contrary opinion, then the verdict was to be entered for the defendant.

R. V. Richards, for the plaintiff:

The codicil, being made under error, and in ignorance of the existence of a daughter of Lewis Evans, is inoperative, and does not revoke the prior disposition of the will. If a false impression of fact is the apparent foundation of the change of intent shown in a later will or codicil, the operation of the latter is contingent upon the existence or non-existence of the fact. Such is the rule laid down in the text books: Swinburne on Wills, part vii. s. 5 (p. 894, &c., 7th ed.); Powell on Devises, 1 vol. p. 523 (3rd ed., by Jarman); 1 Williams on Executors, p. 93 (2nd ed.); Roberts on Wills, Vol. II. p. 40 (3rd ed.). Some of the cases referred to as authorities for this proposition are, indeed, cases of personalty; but there is no distinction, in this respect, between wills of real and of personal property (1). In *Campbell v. French* (2), where the death of the legatee was alleged as the cause of revocation in a subsequent codicil, and it was proved that the legatee was not, in fact, dead, Lord LOUGHBOROUGH, L. C. held that the codicil did not revoke the legacy. In *Kennell v. Abbott* (3) a legacy made under a misapprehension of the legatee's character was held to fail. In *Attorney-General v. *Ward* (4) the revocation was considered sufficient, because it was founded only on doubts of the testatrix whether the former legatees were still living, "and well provided for;" yet the general rule seems to be conceded by Sir R. P. ARDEN, Master of the Rolls, who refers to the well-known case mentioned by Cicero (De Orat. Lib. 1. 38). "Pater, credens filium suum esse mortuum, alterum instituit hæredem; filio domi redeunte, hujus institutionis vis est nulla" (5). *Attorney-General v. Lloyd* (6) turned on a codicil made under an error respecting the illegality of a former devise; and the error was not considered sufficient to vitiate the codicil. In *Gordon v. Gordon* (7) a bequest to a natural child was sustained, where the testator in his will expressed his "belief" that the child was his; and the validity was held not to depend on the fact of its being really his child, because he chose to assume it, and to act

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(1) See, however, the judgment of the Court of Exchequer Chamber, in *Marston v. Roe d. Fox*, 8 Ad. & El. 55, 56.

(2) 4 R. R. 5 (3 Ves. 321).

(3) 4 R. R. 351 (4 Ves. 802).

(4) 3 Ves. 327.

(5) The citation stands thus in *Cook v. Oakley*, 1 P. Wms. 302; but it is not in the language of Cicero, who does

not state the result. The same case, with the decision in favour of the son, is alluded to by Valerius Maximus, lib. vii. c. 7, s. 1. See a decision similar to that in the text, cited from Paulus, in Dig. xxviii. tit. v. c. 92.

(6) 3 Atk. 551.

(7) 15 R. R. 88 (1 Mer. 141).

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upon that assumption ; but Lord ELDON, L. C. there admits that the failure of a reason, assigned positively, would have destroyed the legacy. Where a testator made a fresh will on the supposition that a former one was lost, and the old one was afterwards found, the Prerogative Court held the second to be no revocation of the first: *In the Goods of Richard Moresby* (1).

Jervis, contra :

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The devise in the codicil is absolute ; and it matters not whether the alleged ground of *the alteration be true or not. In *Attorney-General v. Lloyd* (2) Lord HARDWICKE says, " It is a very nice thing to say, that because the reason a man gives for his devise is false, therefore his devise shall fail." Suppose the devise had been to the testator's " son," or to his " chaste wife," there would have been no pretence for impugning its validity by disputing the paternity in the one case, or the chastity in the other. *Kennell v. Abbott* (3) shows this. The decision in that case was founded on the fraud of the legatee in representing himself to be single when he married the testatrix, and thereby obtaining a legacy as her husband. That is the doctrine of the Digest, xxxv. tit. 1, c. 72, s. 6 (4). In order to avoid the codicil, the error should have originated in a deceit practised on the testator: 1 Powell on Devises, p. 525. If the recital had been wholly admitted, then the codicil, however inconsistent with the will, would have been unquestionably good ; and it would have been of no avail to show, by extrinsic evidence, that the codicil was, in fact, founded on misapprehension. The cases cited on the other side are all on legacies of personal property ; and, though there is perhaps no sound distinction between wills of land and of personalty, yet the ecclesiastical courts take more liberties in dealing with wills than the courts of law. They are, for the most part, cases in which a legacy was merely revoked without any substitution of another object in place of the first. *Campbell v. French* (5) was a case of this kind. There the revocation was indeed idle, if the legatees were really dead.

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(PATTESON, J. : Where there is a residuary legatee, *there is, in fact, a substitution.)

The question is one of intention. Here the testatrix let the codicil stand for two years after the real circumstances of the case had

(1) 1 Hagg. Ecc. Rep. 378.

(2) 3 Atk. 551.

(3) 4 R. R. 351 (4 Ves. 802).

(4) See also Cod. vi. tit. 24, c. 4.

(5) 4 R. R. 5 (3 Ves. 322).

come to her knowledge. She died therefore with a full knowledge of both law and fact, and without altering either the codicil or the recital. She has, therefore, made an absolute devise to Henry, and must be taken to have continued of the same mind at the time of her death, when she laboured under no misapprehension.

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R. V. Richards, in reply:

If the codicil was bad when made, it cannot afterwards become a good one. The attempt to look at the mind of the party at the time of death, and not at the making of the will, was disallowed in *Marston v. Roe d. Fox* (1). If it were otherwise, at what precise period of time, during the two years, did the codicil become a good one? There must be republication, after full information, in order to set it up. Fraud was not the ground of the decision in *Campbell v. French* (2), but the erroneous recital. As to the supposed case of a legacy to a man's "son," *eo nomine*, it would not take effect unless he were the son, or had the reputation of being so. The only question, in such cases, would be, whether the person were sufficiently described, and the exact truth of the description would be of secondary importance. The cases of *Campbell v. French* (2), and *In the Goods of Moresby* (3), are unanswered, and no authority has been produced against them.

(LORD DENMAN, Ch. J.: In *The Lord Cheyney's* case (4) there is a remark apparently at variance with the doctrine which you support. "If *a man has two sons both baptised by the name of John, and conceiving that the elder (who had been long absent) is dead, devises his land by his will in writing to his son John generally, and in truth the elder is living; in this case the younger son may in pleading or in evidence allege the devise to him; and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead" (5). This seems to assume that the will, though made under error, would nevertheless stand.

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(1) 8 Ad. & El. 14.

(2) 4 R. R. 5 (3 Ves. 322).

(3) 1 Hagg. Ecc. Rep. 378.

(4) 5 Co. Rep. 68 b.

(5) The report goes on thus: "no inconvenience can rise if an averment in such case be taken in case of a devise by will, for he who sees such will, whereby land is devised to his son

John, cannot be deceived by any secret invisible averment: for when he sees the devise to his son John, he ought at his peril to enquire which John the testator intended, which may easily be known by him who wrote the will, and others who were privy to his intent."

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PATTESON, J.: It does not follow that the father would not have preferred the younger son, even if he had known that both were alive.)

LORD DENMAN, Ch. J.:

The authorities cited on the part of the plaintiff show that such a revocation as this is a conditional one. It is clear, on the face of the codicil, that the testatrix had no intention to interfere with her former disposition by the will. No intention to revoke it can be inferred. The doctrine in *The Lord Cheyney's* case (1) is distinguishable; for we have there no revocation of a former will, nor any proof of what the testator would have done if he had known of his mistake.

LITTLEDALE, J.:

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There is evidently no intention to leave the property away from the family of Lewis. The *daughter was a posthumous child, and was probably unknown to the testatrix on that account. The codicil was intended to take effect only on failure of the original devise; and I am therefore of opinion, under the circumstances, that nothing passed by it, unless it may possibly hereafter have the effect of giving the property to Henry upon the failure of the original devise. As to her becoming acquainted with the fact after the codicil was made, this alone cannot set it up; otherwise it might be established by showing that she lived only one day after she knew of the daughter's existence.

PATTESON, J.:

The meaning of the party at the time of making the codicil is alone to be looked at. At that time she knew nothing of the birth of a daughter; she therefore states that Lewis had "since departed this life without leaving any issue," that is, any issue now living. We must read this as if it had been, in terms, a devise to Henry, provided Lewis and his issue are really dead. If it had been so expressed, the subsequent information would clearly have made no difference. To give such an effect to a subsequent knowledge of the circumstances would be making a new codicil for the testatrix. All that Lord HARDWICKE appears to mean in *Attorney-General v. Lloyd* (2) is, that a man shall not die intestate merely because he gives a false reason for his bequest. This is not a dying intestate, but a restoration of the original will.

(1) 5 Co. Rep. 68 b.

(2) 3 Atk. 551.

WILLIAMS, J. :

This is admitted to be a question of intention. Now the codicil evidently does not proceed *on any change of mind in regard to the original devisee. It only substitutes one devise for another, on the supposition that the first cannot take effect. The condition of revocation fails, because it appears that the party, who was always intended to be benefited, is capable of receiving the benefit intended.

Judgment for the plaintiff.

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(10 Adol. & Ellis, 309—323; S. C. 2 P. & D. 477.)

Declaration in assumpsit, stating that defendant promised, in consideration that plaintiffs, at his request, would give up to him a certain guarantee of 10,000*l.* on behalf of L., then held by plaintiffs. Averment, that plaintiffs gave up the guarantee, but defendant did not perform his promise. Plea, that the guarantee was a promise to answer for the debt of another, and that there was no agreement, &c., in writing, wherein any sufficient consideration was stated (according to stat. 29 Car. II. c. 3, s. 4). And that the supposed guarantee was contained in the following written memorandum signed by defendant: "Messrs. H." (the plaintiffs). "In consideration of your being in advance to L. in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount on their behalf. J. B."

Held, by the Court of Queen's Bench, on demurrer, that the words of the guarantee did not necessarily imply a past advance; and that, if they left it even doubtful whether a future advance was not guaranteed, a promise made in consideration of giving it up was valid. But,

Held, further, that at all events it appeared on the pleadings that the plaintiffs had delivered something to the defendant, on the faith of his promise, which he at the time considered valuable, and this being so, and no fraud imputed, he could not afterwards excuse a breach of the promise, by alleging that the thing given up was not of the value he had supposed.

Judgment affirmed on error, by the Court of Exchequer Chamber.

Held, by the Court of Error, that the guarantee did not necessarily imply a past advance; and that the plaintiffs, on a trial, might have offered evidence to show that future advances had been contemplated.

Held also, MAULE, B. *dubitante*, that the paper on which the guarantee was written appeared by the declaration and plea to have been given up by plaintiffs to defendant; and that this alone was consideration for a promise.

Held, by the Court of Queen's Bench, that, on the trial of an issue of fact raising the question whether or not the above guarantee had been delivered up, the guarantee might be given in evidence, though unstamped.

ASSUMPSIT. The first count of the declaration stated that heretofore, to wit on &c., "in consideration that the said plaintiffs, at the special instance and request of the said defendant, would give up to him a certain guarantee of 10,000*l.* on behalf of Messrs.

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John Lees and Son, Manchester, then held by the said plaintiffs, he the said defendant undertook, and then faithfully promised the said plaintiffs, to see certain bills, accepted by the said Messrs. John Lees and Sons, paid at maturity; that is to say, a certain bill of exchange "bearing date, &c., drawn by plaintiffs upon and accepted by the said Lees and Sons, payable three months after date, for 3,466*l.* 1*s.* 7*d.*, and made payable at, &c.: and also a certain other bill, &c.: describing two other bills for 3,000*l.* and 3,200*l.* drawn by plaintiffs upon and *accepted by Lees and Sons, and made payable at &c.: Averment, that plaintiffs, relying on defendant's said promise, did then, to wit on, &c., "give up to the said defendant the said guarantee of 10,000*l.*" Breach, non-payment of the bills, when they afterwards came to maturity, by Lees and Sons, or the parties at whose houses the bills respectively were made payable, or by defendant, or any other person, &c.

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Third plea, to the first count: "That the said supposed guarantee of 10,000*l.*, in consideration of the giving up whereof the defendant made such supposed promise and undertaking as therein mentioned, and which guarantee was so given up to the said defendant as therein mentioned, was a special promise to answer the said plaintiffs for the debt and default of other persons, to wit the said Messrs. John Lees and Sons in the said first count mentioned; and that no agreement in respect of, or relating to, the said supposed guarantee or special promise, or any memorandum or note thereof, wherein any sufficient consideration for the said guarantee or special promise was stated or shown, was in writing and signed by the said defendant, or any other person by him thereunto lawfully authorized. And the said defendant further saith that the said supposed guarantee, in consideration of the giving up whereof the defendant made the said supposed promise and undertaking in the said first count mentioned, and which was so given up as therein mentioned, was and is contained in a certain memorandum in writing signed by the defendant, and which was and is in the words and figures and to the effect following, that is to say: 'MANCHESTER, 4th February, 1837. Messrs. Haigh and Franceys. GENT.—In consideration of your being *in advance to Messrs. John Lees and Sons, in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount (say 10,000*l.*), on their behalf. JOHN BROOKS.'—And that there was no other agreement or memorandum or note thereof, in respect of, or relating to, the said last-mentioned supposed guarantee or special promise: wherefore the said defendant

says that the supposed guarantee, in consideration whereof the said defendant made the said supposed promise and undertaking in the said first count mentioned, was and is void and of no effect; and therefore that the said supposed promise and undertaking in the said first count mentioned was and is void and of no effect." Verification.

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Demurrer, assigning for cause, "that it is admitted by the plea that the memorandum, the giving up of which was the consideration of the guarantee in the said declaration mentioned, was actually given up to the said defendant by the said plaintiffs, and the consideration was therefore executed by the said defendant, and that, even if the original memorandum was not binding in point of law, the giving up was a sufficient consideration for the promise in the declaration mentioned." Joinder.

The demurrer was argued in last Hilary Term (1).

Sir W. W. Follett, for the plaintiff:

The undertaking declared upon is, on the face of it, sufficient to satisfy the Statute of Frauds, 29 Car. II. c. 3, s. 4. It is said, however, that the consideration is really insufficient, because the guarantee delivered up was one which could *not have been sued upon consistently with the statute. But, assuming that to be so, a promise in consideration of delivering up such a guarantee might still be good. The defendant might, for substantial reasons, wish to have the guarantee back. His mercantile character was pledged by it. It might, on various other accounts, be important to him that such a paper should not remain in the plaintiff's hands; and, if the bargain was made upon any consideration, the Court will not inquire into its adequacy. This principle was lately recognised in *Hitchcock v. Coker* (2). Such a promise might be made in consideration of delivering up a letter; no one but the defendant might be able to judge how far the possession of it was valuable; but, if the letter was given up at his request, the rule would apply, that any thing so given, to the plaintiff's detriment, or the benefit of the defendant, is consideration for an assumpsit. Suppose the undertaking given up had been one rendered unavailing by the Statute of Limitations, no action would have lain upon it, but the attempt to enforce it could not perhaps have been resisted without injury

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(1) January 18th. Before Lord Denman, Ch. J., Littledale, Williams, and Coleridge, JJ.

(2) 45 R. R. 522 (6 Ad. & El. 438). And see *Archer v. Marsh*, 45 R. R. 655 (6 Ad. & El. 959).

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to the defendant's mercantile character; the relinquishment of it, therefore, would have been good consideration for a promise. The present is a similar case. Release from a moral obligation is consideration enough for an express promise. If it were necessary that something should be foregone to which there was a legal right, the delivery of the mere written paper, which contained the first guarantee, was sufficient in this case. The plaintiffs are entitled to put some value on the possession of such a paper, though not legally available; as they might on the possession of a cancelled bond, or bills *accepted by the defendant on wrong stamps. It is not, indeed, clear in this case that the first guarantee was void. In *Boehm v. Campbell* (1) a similar guarantee was held to show a sufficient consideration, though the advance for which the security was given had been already made, and it did not appear more distinctly than in the present case that time was to be granted. Supposing it even questionable whether the former undertaking bound the defendant, yet the discharge from a claim, or waiver of a defence, on which the promisee might or might not have been legally entitled to succeed, is consideration enough to support an assumpsit: *Longridge v. Dorville* (2), *Stracy v. The Bank of England* (3). Here, however, it appears, at all events, that the original guarantee may have been given under circumstances which rendered it morally binding; and that brings it within the principle of *Lee v. Muggeridge* (4), and other cases in which promises supported by moral obligation have been held sufficient.

Sir J. Campbell, Attorney-General, *contra* :

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First, the original guarantee was void; and, if so, then, secondly, the promise declared upon is without consideration. First, the guarantee of February 4th, 1837, expresses only the past consideration of the plaintiffs "being in advance." The cases cited in note (1) to *Osborne v. Rogers* (5) show that this is not sufficient ground for an assumpsit, no request being alleged. A valid consideration was essential to a promise at common law; and, when the Statute of Frauds required that the agreement, *in certain cases, should be written, it thereby became necessary, not only that a proper consideration should exist, but that the writing should distinctly show it: *Wain v. Warlters* (6), *Saunders v. Wakefield* (7),

(1) 8 Taunt. 679; 3 Moore, 15.

(2) 5 B. & Ald. 117.

(3) 6 Bing. 754.

(4) 5 Taunt. 36.

(5) 1 Wms. Saund. 264.

(6) 7 B. R. 645 (5 East, 10).

(7) 23 B. R. 409 (4 B. & Ald. 595).

Jenkins v. Reynolds (1), *Cole v. Dyer* (2), *Wood v. Benson* (3), *James v. Williams* (4). A consideration cannot be intended; it must be actually expressed, or necessarily to be implied: *Hawes v. Armstrong* (5), *Raikes v. Todd* (6). Secondly, the guarantee being void, the undertaking substituted for it, without any new consideration, is void also. The case is no better than if a second guarantee had been given in the words of the first. A consideration, to support a promise, must have some value in point of law: *Smith and Smith's case* (7), and other authorities cited in note [b] to *Barber v. Fox* (8). *Rann v. Hughes* (9) illustrates the same point. A man may have in his possession a letter of which improper use might be made; but his delivering it up is no legal consideration. An unfounded action may create annoyance; but the renouncing it is no consideration in law for a promise. Where, indeed, there is a reasonable doubt, in point of law, whether the promisee would or would not succeed if the litigation were prosecuted, the case is different: that was so in *Longridge v. Dorville* (10) and *Stracy v. The Bank of England* (11). In *Shortrede v. Cheek* (12) the consideration disclosed was, *that the plaintiff should withdraw a promissory note, on which he had an unquestioned right of action: and PARKE, J. said, "There is no doubt that the giving up of any note upon which the plaintiff might have sued, would be a sufficient consideration." It is argued that foregoing a security upon which the Statute of Limitations had attached would be a consideration; but there an action would lie on the security if the statute were not pleaded. Whether the giving up a bill drawn on a wrong stamp would be a consideration or not may be questionable; but the objection is not one of which the Court would take judicial notice: here the Court must take notice that the guarantee is invalid. It is contended here that the promise is binding, because grounded on a moral obligation; but that obligation rests on a promise which is itself not binding; the new engagement, then, cannot have more force than the original one. In the cases where a moral obligation has been held sufficient ground for an express promise, the obligation has been something more than a *nudum pactum*:

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| (1) 3 Brod. & B. 14. | (8) 2 Wms. Saund. 137 e, 5th ed. |
| (2) 1 Cro. & J. 461; 1 Tyr. 304. | See <i>Jones v. Waite</i> , 5 Bing. N. C. 341, |
| (3) 37 R. R. 635 (2 Cro. & J. 94; 2 Tyr. 93). | p. 705, below. |
| (4) 5 B. & Ad. 1109. | (9) Note (a) to <i>Mitchinson v. Hewson</i> , 7 T. R. 350. |
| (5) 1 Bing. N. C. 761. | (10) 5 B. & Ald. 117. |
| (6) 47 R. R. 513 (8 Ad. & El. 846). | (11) 6 Bing. 754. |
| (7) 3 Leon. 88. | (12) 40 R. R. 258 (1 Ad. & El. 57). |

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thus, in *Lee v. Muggeridge* (1) money had been advanced by the plaintiff at the request of the promisor. But the doctrine, that a moral obligation is sufficient consideration for a subsequent promise, is not free from doubt. Lord TENTERDEN said, in *Littlefield v. Shee* (2), that it must be "received with some limitation." The instances which have been considered as establishing that doctrine are brought together in note (a) to *Wennall v. Adney* (3), and seem to resolve themselves into these classes. First, where there has been a legal obligation antecedent to the promise; as the duty of overseers to provide for the *poor. Secondly, where there was an antecedent equitable liability, as that of an executor to pay legacies; but the doctrine, as applicable to these cases, appears to have been overruled. Thirdly, where a debt existed before the promise, but the remedy was barred by statute; as in the cases of certificated bankrupts or discharged insolvents; or where the Statute of Limitations has attached: in these instances the party indebted may waive the statutory bar and oblige himself, by a promise, to pay the debt. Fourthly, where a promise merely voidable has been ratified; as in the case of a person of full age promising to pay a debt contracted during his infancy (4). In all these cases, so far as the doctrine is established, there has been an actual benefit received, or a debt, or other ground of legal obligation, antecedent to the promise relied upon: not merely a *nudum pactum*, as in the present instance, where the party originally promising had received no benefit, nor had the plaintiffs incurred any loss or prejudice at his request. The money had been advanced when the guarantee was given; then the defendant says, "Forego the guarantee, and I will see you paid." The prior moral obligation was only that which every man is under to keep his word. *Nash v. Brown* (5), *Holliday v. Atkinson* (6), and *Bret v. J. S. and his Wife* (7) (cited in note [b] to *Barber v. Fox* (8)), all show that moral considerations, where no actual benefit has been received by one party, or prejudice sustained by the other, and no legal duty has attached, are not sufficient *ground for an assumpsit. As to the delivery, in this case, of the mere paper, it is not pretended that the paper had any value: the contract of guarantee, not the paper containing it, was the object really in question.

(1) 5 Taunt. 36.

(2) 2 B. & Ad. 811.

(3) 6 R. R. 780 (3 Bos. & P. 247).

(4) See *Meyer v. Haworth*, 47 R. R.

635 (8 Ad. & El. 467).

(5) Chitty on Bills, 74, note (x), 9th ed. (1840) by Chitty and Hulme.

(6) 29 R. R. 299 (5 B. & C. 501).

(7) Cro. El. 755.

(8) 2 Wms. Saund. 137 e, 5th ed.

Sir W. W. Follett, in reply :

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It may be collected from the guarantee in this case, as it was from that in *Boehm v. Campbell* (1), that the consideration for giving it was forbearance; and, if that appears with certainty, though not expressed in direct terms, the guarantee was sufficient. *Boehm v. Campbell* (1) is not overruled by *Raikes v. Todd* (2). This Court, in the latter case, could not see clearly that the consideration stated in the guarantee was that alleged in the declaration: but two of the learned judges were inclined to think, with ALDERSON, B. who tried the cause, that "I hereby undertake to secure to you the payment of any sums of money you have advanced" to H. D. implied a future forbearance by the plaintiffs. So far, that case is favourable to the present plaintiffs: and the words relied upon by them, "I do hereby give you my guarantee for that amount," are stronger than those used in *Raikes v. Todd* (2). And, if it was only doubtful whether such a guarantee was not available, the giving it up was a good consideration. If the invalidity of it was not a point as clear as that the eldest son inherits, the Court will not measure the degree of doubt. It has scarcely been disputed that the giving up of bills drawn on wrong stamps, or a contract on which the Statute of Limitations had attached, would be sufficient consideration: but those cases do not essentially differ from the present. The *bills are void from the first, and cannot be made valid; though the promisor may have good reason for wishing to get them into his possession. It is suggested that the bar created by the Statute of Limitations may be waived; but so also may that under the Statute of Frauds. It is clear that, to support a promise of this kind, there need not have been an original liability in the promisor; for that is not so in the case of the bills, or in that of the contract made during infancy. That a promise may be founded on sufficient consideration, though no benefit has accrued to the promisor, appears from *Stevens v. Lynch* (3), where the drawer of a bill, knowing that time had been given to the acceptor, undertook to pay on the acceptor's default, and an action was held maintainable on that undertaking. But, supposing the guarantee in this case to have been totally void, the giving up of a paper on which no action would lie may be sufficient consideration for a promise. Here the plaintiffs, though not entitled to recover on the guarantee, might have brought trover for the

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(1) 8 Taunt. 679; 3 Moore, 15.

(3) 12 East, 38.

(2) 47 R. R. 513 (8 Ad. & El. 846).

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document if unlawfully taken out of their hands. In considering whether or not such an action would lie, the value would be of no importance; it is enough for the present argument, if the plaintiffs could have recovered a shilling. Suppose the defendant had said, "If you will not bring trover, I will pay the bills;" an action would clearly have lain on such an agreement, and the case would not have differed from the present. The consideration here is, not the releasing of an action on the guarantee, but the giving it up; whatever its value may have been, the bargain is binding.

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(COLERIDGE, J.: It is decided in *Scott v. *Jones* (1) that trover lies for an unstamped document if it is capable of being made good by stamping.)

Any paper may be the subject of an action of trover.

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (June 6th), delivered the judgment of the COURT:

This action was brought upon an assumpsit to see certain acceptances paid, in consideration of the plaintiffs giving up a guarantee of 10,000*l.* due from the acceptor to the plaintiffs. Plea, that the guarantee was for the debt of another, and that there was no writing wherein the consideration appeared, signed by the defendant, and so the giving it up was no good consideration for the promise. Demurrer, stating for cause that the plea is bad, because the consideration was executed, whether the guarantee were binding in law or not. The form of the guarantee was set out in the plea. "In consideration of your being in advance to Messrs. John Lees and Sons, in the sum of 10,000*l.* for the purchase of cotton, I do hereby give you my guarantee for that amount (say 10,000*l.*), on their behalf. JOHN BROOKS."

It was argued for the defendant that this guarantee is of no force, because the fact of the plaintiffs being already in advance to Lees could form no consideration for the defendant's promise to guarantee to the plaintiffs the payment of Lees' acceptances. In the first place, this is by no means clear. That "being in advance" must necessarily mean to assert that he was in advance at the time of giving the guarantee, is an assertion open to

(1) 14 R. R. 686 (4 Taunt. 865).

argument. It may possibly have been intended *as prospective. If the phrase had been "in consideration of your becoming in advance," or "on condition of your being in advance," such would have been the clear import (1). As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs. Lees, or believe that the plaintiffs had not come under the advance mentioned at the defendant's request. Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guarantee; and, if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it.

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But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact could entitle us to hold that a party was not bound by a promise made upon any consideration which could be valuable; while of its being so the promise by which it was obtained from the holder of it must always afford some proof.

Here, whether or not the guarantee could have been available within the doctrine of *Wain v. Warlters* (2), the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge. *We therefore think the plea bad: and the demurrer must prevail.

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Judgment for the plaintiffs.

There was also, in this case, an issue of fact, raising the question whether or not the plaintiffs had given up the original guarantee. On this issue the parties went to trial at the Liverpool Spring Assizes, 1899, before Alderson, B. The plaintiffs called on the defendant to produce the guarantee. On production it appeared to be unstamped, and *Cresswell*, for the defendant, therefore objected to its being read. ALDERSON, B. admitted it; and the plaintiffs had a verdict. *Cresswell* moved for a new trial in the ensuing Term, on account of the admission of that evidence; and

(1) See the discussion on the words *ingtower v. Gardiner*, 1 B. & C. 297.
"for giving his vote," in *Lord Hunt-* (2) 7 R. R. 645 (5 East, 10).

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he cited *Jardine v. Paine* (1). PATTESON, J. mentioned *Coppock v. Bower* (2) and *Walliss v. Broadbent* (3). The rule was afterwards made absolute by consent. The cause was tried again at the Liverpool Spring Assizes, 1840, before ERSKINE, J. The guarantee was not produced, having been destroyed since the last trial; but the learned Judge (assuming it not to have been stamped) allowed evidence to be given of its contents; and, on this ground, *Cresswell*, in the ensuing Easter Term, moved for a new trial (4). He referred to *Crisp v. Anderson* (5) and *Gillett v. Abbott* (6).

Cur. adv. vult.

LORD DENMAN, Ch. J. in the same Term (April 27th, 1840) delivered the judgment of the COURT:

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This was an action on an agreement made in consideration of *giving up a former guarantee. Plea, that the guarantee was not, in fact, given up. On a former trial, before Alderson, B., the paper in question was produced, without a stamp. The learned Judge received the evidence; and we thought the case sufficiently doubtful to grant a rule for a new trial. The plaintiff submitted to its being made absolute; and a second trial took place before my brother Erskine at the last Assizes. In deference to the former decision, which had not been overruled but was only in a course of investigation, and, as we understand, with some intimation that he thought the evidence admissible, he received evidence that the paper (at the time of the trial destroyed) had been given up in an unstamped state, which raised precisely the same point. A motion for a new trial, on this ground, has now been made: but upon more consideration we agree in opinion with the two learned Judges, and think that the paper, for the purpose for which it was produced, required no stamp.

The authority mainly relied on for the opposite doctrine is *Jardine v. Paine* (1): but the unstamped paper there was the very bill of exchange in respect of which the action was brought, and through which the plaintiff must have made out his title to recover. There was an attempt to resort to the unstamped paper to show the amount due, which would have been successful if the acknowledgment referring to it had been made to the plaintiff: but it was

(1) 1 B. & Ad. 663.

(2) 4 M. & W. 361.

(3) 4 Ad. & El. 877.

(4) April 16th. Before Lord Den-

man, Ch. J., Littledale, Patteson, and Coleridge, JJ.

(5) 1 Stark. 35.

(6) 7 Ad. & El. 783.

made to the holder of the bill; and direct proof of the bill was therefore necessary. The principle of that decision may be taken from Lord TENTERDEN's words in giving judgment; it cannot be proved unstamped, as a security. Now the paper here *called a guarantee was not wanted as a security, but as a description of the consideration for the defendant's promise. An inadequate security might, from various motives, be a very good consideration; and this document, if produced, might have been read to the jury to show that it answered the description in the declaration of a guarantee, though it was not a binding guarantee for want of a stamp. If the defendant had simply pleaded that the guarantee was without a stamp, such plea would have been held bad on demurrer.

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Rule refused.

The plaintiffs having signed judgment, error was brought in the Exchequer Chamber, and the judgment below was affirmed. The arguments, and judgment of the Court of Error, may conveniently be inserted here.

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE QUEEN'S BENCH.)

BROOKS v. HAIGH AND ANOTHER.

(10 Adol. & Ellis, 323—334.)

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THE writ of error set out the pleadings, of which the material part is stated in the preceding report. The errors assigned were, that the declaration is insufficient, and that the judgment was for the plaintiffs below, whereas it ought to have been for the defendant. The writ of error was argued in Trinity vacation (June 22nd) 1840, before Lord Abinger, C. B., Bosanquet, Coltman, and Maule, JJ., and Alderson and Rolfe, Barons.

Sir J. Campbell, Attorney-General, for the plaintiff in error, the defendant below, contended, on the authorities *before cited, that the original guarantee was void, being on a consideration executed, and not alleged to have been executed at the defendant's request.

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(ALDERSON, B.: Is not it ambiguous whether the words, "in

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consideration of your being in advance," refer to the being already in advance, or being so in future?)

The language is unambiguous, and will not bear a prospective construction. *Boehm v. Campbell* (1) was decided while a doubt still prevailed as to the doctrine of *Wain v. Warlters* (2); but in *Boehm v. Campbell* (1) the Court of Common Pleas thought that the consideration of forbearance sufficiently appeared by the written agreement. Here it is neither stated in the guarantee, nor necessarily to be collected from it; *Raikes v. Todd* (3), therefore, is an authority for the defendant below. Then no action would have lain on this guarantee; and if so, is the giving it up sufficient consideration for a new promise? Such an act is no consideration unless the thing given up be of some merchantable value. Thus in Com. Dig., Action upon the Case upon Assumpsit, (F. 8), (cited by HOLROYD, J. in *Longridge v. Dorville* (4)) it is said that the action does not lie upon a promise "in consideration of a surrender of a lease at will; for the lessor might determine it." There is, indeed, a qualification added; "unless there was a doubt, whether it was a lease at will, or for years:" but even then, unless the doubt were a very reasonable and well-grounded one, the action would fail. In *Smith and Smith's* case (5) the alleged consideration for an assumpsit was, that the promisee "would commit the education of his children, *and the disposition of his goods after his death during the minority of his said children, for the education of the said children" to the defendant; and this was held not sufficient, the consideration being only to have the disposition of the goods for the benefit of the children, and not for the defendant's profit. There must be some advantage to the promisor, or detriment incurred by the promisee at his request.

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(MAULE, J. : It need not be pecuniary.

LORD ABINGER, C. B. : In *Smith and Smith's* case (5) the suggestion in support of the consideration was that the defendant was to reap a pecuniary advantage, which the Court would not presume, because his doing so would have been a breach of trust.)

The advantage must be such as can be appreciated in a court of law. There are many cases in which promises in consideration

(1) 8 Taunt. 679; 3 B. Moore, 15.

(4) 5 B. & Ald. 123.

(2) 7 R. R. 645 (5 East, 10).

(5) 3 Leon. 88.

(3) 47 R. R. 513 (8 Ad. & El. 846).

of forbearance to sue have been held void, where there was no suit that could have been forborne: *Tooley v. Windham* (1), *Barber v. Fox* (2), *Loyd v. Lee* (3). It is true that the giving up a doubtful point of law has been held a good consideration, as in *Longridge v. Dorville* (4); and it may be so where a reasonable doubt exists; but in this case there could be no doubt on the invalidity of the first guarantee.

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(ALDERSON, B.: What is the ground on which the giving up a doubtful point of law is a consideration? To whom must it be doubtful? The Court which decides upon the assumpsit must be supposed capable of deciding the point of law.)

There is a degree of uncertainty which the Courts will notice.

(MAULE, J. referred to *Jones v. Randall* (5).)

In *Stracy v. The Bank of England* (6) the point which might have *been litigated was one of great nicety and difficulty. TINDAL, Ch. J., in his judgment, so describes it. The argument on moral obligation can apply only to the first guarantee; the terms of the declaration do not admit of its being extended to the second. And on the first guarantee no consideration appears, except the general obligation to perform a promise.

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The Court below, in their judgment, argue that the words "in consideration of your being in advance" might mean "on condition of your being in advance;" and suggest, as rendering this probable, that the plaintiffs must have come under the advance at the defendant's request; a supposition not confirmed by any thing which appears on the record: and they ground upon it the observation, "Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guarantee; and, if that be so, we have no concern with the adequacy or inadequacy of the price." They also say: "Whether or not the guarantee could have been available within the doctrine of *Wain v. Warlters* (7), the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise."

(1) Cro. Eliz. 206.

(2) 2 Saund. 136.

(3) 1 Stra. 94.

(4) 5 B. & Ald. 117.

(5) 1 Cowp. 37.

(6) 6 Bing. 754.

(7) 7 R. R. 645 (5 East, 10).

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(MAULE, J.: The record does not show that any document was in the plaintiff's possession. "Giving up" the guarantee might be merely relinquishing the contract.

ALDERSON, B.: If they held a written guarantee, it might have been given up by cancelling merely.)

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The Court below argue that the defendant cannot be justified in breaking his promise by discovering that the thing in consideration of which he gave it did not possess that value which he supposed *to belong to it. "It cannot be ascertained," they say, "that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge." But this reasoning would support a promise even in such a case as *Barber v. Fox* (1). The plaintiffs contend that trover would have lain for the paper; but it may be inferred, even from *Scott v. Jones* (2), that this would not be so unless the paper had some real value.

Sir W. W. Follett, contra:

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As to the observation that no actual delivery of a written paper appears, if that were considered important, the plaintiffs would ask leave to amend. The point was not taken on the former argument; and, when the declaration speaks of giving up a guarantee, which it describes as "then held" by the plaintiffs, it cannot reasonably be supposed that nothing is meant but foregoing an engagement. Supposing that no action would have lain on the first guarantee, here is an agreement between persons competent to make contracts, without imputation of fraud on either side, by which one is to give up an undertaking signed by the other, and the other, in consideration of it, is to provide for certain bills. It is assumed, without reason, that the defendant's only object in desiring to have the guarantee back must have been to prevent an action. He might not choose that his name should remain abroad in the mercantile world, annexed to such a document. It implies an admission which he might think proper to recall. He might not wish, if sued, to be put to a defence on the Statute of Frauds. If he *attached a value to the document from any cause, however inadequate, as a man might be willing to give an immoderate price for a picture or autograph, the Court will not inquire into the goodness of the bargain. Giving up any thing of which they were possessed was a

(1) 2 Saund. 136.

(2) 14 R. R. 686 (4 Taunt. 865).

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disadvantage to the plaintiffs; and the defendant here was benefited by it. The case, therefore, differs from that of a mere forbearance to sue, where nothing is given and received. The law of *Smith* and *Smith's* case (1) may be doubted. If the promisee there complied with terms by which the defendant obtained something from him, although those terms could not authorise the making of any illegal profit, it would seem that the defendant was bound.

But an action here might have been maintained on the first guarantee. The doctrine of *Wain v. Warlters* (2) cannot now be disputed, though the decision may be regretted as going beyond the object contemplated by the Statute of Frauds. But the consideration, though it must be stated, need not be set forth with all the accuracy of special pleading: *Raikes v. Todd* (3) shows this. And, unless the written agreement is so expressed that it must necessarily have been a *nudum pactum*, those relying upon it may show, by the situation of the parties and by other extrinsic circumstances adduced in evidence, that a valid consideration was contemplated. "In consideration of your being in advance," may refer to future advances; and the plaintiffs might show that it did so, by evidence that at the time of making the promise there had been no advance. Even if the advance were a past one, the language, which is that of the party *promising, will be taken most strongly against himself, and may be presumed to mean that the advance was at his request. It is clear, from several cases, that the Courts, in estimating the consideration of a written agreement, will look at the extrinsic circumstances. This was so, to a certain extent, in *Morris v. Stacey* (4); TINDAL, Ch. J. refers to such circumstances in *Stracy v. The Bank of England* (5); so also does RICHARDSON, J. in *Boehm v. Campbell* (6). In *Newbury v. Armstrong* (7) TINDAL, Ch. J. took into consideration the probable state of facts, as he inferred it from the terms of the guarantee; and that inference might clearly have been supported or varied by other proof. In *Shortrede v. Cheek* (8) the guarantee required, as consideration for the defendant's promise, that the plaintiff should withdraw "the promissory note;" and this was alleged in the declaration to have been a note given to the plaintiff by one Henry Cheek, which note was proved to have been so given. It was urged that the statement of consideration on the

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(1) 3 Leon. 88.

(2) 7 R. R. 645 (5 East, 10).

(3) 47 R. R. 513 (8 Ad. & El. 846).

(4) Holt, N. P. 153.

(5) 6 Bing. 754.

(6) 3 Moore, 15.

(7) 31 R. R. 386 (6 Bing. 201).

(8) 40 R. R. 258 (1 Ad. & El. 57).

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guarantee was uncertain, because it did not refer to this note in particular: but the Court held otherwise; and LITLEDALE and PARKE, JJ. observed that, on the evidence, only one note had appeared to be in question. So, here, it might be shown by evidence that there was no advance in question, prior to the guarantee. *Raikes v. Todd* (1) is, in principle, an authority for the plaintiffs below. The declaration there stated, as a consideration for the alleged promise, future advances, and not a forbearance in respect of advances past; had the count been properly framed, it might *have been shown by evidence; that the guarantee had, in fact, reference to both. The guarantee itself was not impeached. The Court of Exchequer acceded to the doctrine of that case in *Kennaway v. Treleavan* (2) (where they held that the consideration was sufficiently disclosed); and *Newbury v. Armstrong* (3) was there relied upon as an authority.

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Supposing, however, that an action would not have lain on the first guarantee, yet, if the law upon the subject was doubtful (though *Boehm v. Campbell* (4) makes it clear on the side of the plaintiffs), and the parties, upon that doubt, entered into a bargain for the abandonment of the guarantee, such bargain, made with a knowledge of all the facts, is binding: *Longridge v. Dorville* (5), *Stracy v. The Bank of England* (6), Com. Dig., Action upon the Case upon Assumpsit (F 8), referring to 1 Roll. Abr. 23, Action sur Case (V), pl. 27, 28 (7). It is indeed asked, who is supposed to entertain the doubt in point of law? But matters of law may be considered as doubtful to the Courts; and arrangements in equity are often made on the ground of the law being doubtful.

(BOSANQUET, J. : A point may be considered so, on which learned men differ.

LORD ABINGER, C. B. : It is carrying fiction too far to say that the Courts must always know how the law will be.)

The parties here have made their contract on a consideration which they, knowing all the facts, thought beneficial; and this is enough. Merchantable or pecuniary value, in any more limited sense, is not

(1) 47 R. R. 513 (8 Ad. & El. 846).

(2) 5 M. & W. 498.

(3) 31 R. R. 386 (6 Bing. 201).

(4) 8 Taunt. 679; 3 Moore, 15.

(5) 5 B. & Ald. 117.

(6) 6 Bing. 754.

(7) Comyns refers to *Kent v. Prat*, Brownl. & Gold. 6, the case cited by Rolfe. But it does not appear that any doubtful point of law was there contemplated.

to be insisted upon. The *case falls within the principle of *Stevens v. Lynch* (1), and also within that of *Lee v. Muggeridge* (2) and other decisions which have turned upon moral obligation. It results from all these authorities that, if parties, having made an engagement which ought to bind them but is incapable of being enforced, replace it by another, that new engagement is valid in law. If the contrary doctrine could prevail, what limit would there be to objections? Would a second or third renewal of guarantees be void on account of the original defect?

Lastly, as was contended below, if the consideration amounts to no more than the delivering up of a paper at the defendant's request, the Court cannot say that it is insufficient. If they do, at what point will they allow sufficiency of consideration to begin? Would the giving up an autograph, or a horse or dog of no merchantable value, be sufficient?

(LORD ABINGER, C. B. : The *Attorney-General* cited the case of a lease at will.)

That relates to a surrender, not the giving up of a document. Papers, though ineffectual for the purpose contemplated in drawing them up, may have a value from the mere wish of a party to get them into his own hands.

(ROLFE, B. : The LORD CHANCELLOR has said that he will never compel the giving up of an instrument which is void on the face of it (3).)

An application in equity for that purpose is very different from the enforcing of a bargain to give up something which is considered valuable.

(BOSANQUET, J. : Is not the document property, however small the value?)

Yes; and trover would lie for it. In *Wilkinson v. Oliveira* (4) it was held sufficient consideration, for a promise to pay 1,000*l.*, that the plaintiff, being possessed of a certain letter, had *given it to the defendant. It is true that the defendant was alleged to have made a beneficial use of the letter; but that was not an essential part of the consideration. Here the defendant could judge of the value of

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(1) 12 East, 38.

(2) 5 Taunt. 36.

(3) *Simpson v. Lord Howden*, 45

R. R. 225 (3 My. & Cr. 97), is probably the case alluded to.

(4) 1 Bing. N. C. 490.

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the document, and, using his judgment, made the promise. He cannot now annul it on the ground that the instrument was of no value.

Sir J. Campbell, Attorney-General, in reply :

The last argument rests on a fallacious assumption. The bargain declared upon was, not for the delivery of a piece of paper, but for the release of a contract. It does not appear that the paper itself may not even now be in the plaintiffs' possession. The plea, that the guarantee was of no effect, agrees with this view of the case. The main argument on the other side, assuming the first guarantee to be void, is, in effect, that, because it was given up at the defendant's request, he is estopped from saying that such an abandonment was no consideration for his promise. But this is contrary to the principle of many *placita* in Com. Dig. Action upon the Case upon Assumpsit (F 8), already cited. On those authorities, if the right foregone was in reality null, it cannot be material that the parties made their agreement on a contrary supposition. The question therefore really is, whether the first guarantee was valid or not. It is established by *Wain v. Warlters* (1) that, under the Statute of Frauds, no notice can be taken of a consideration not in writing; and in no instance has a guarantee been held good, where a sufficient consideration did not appear on the face of the instrument. In *Kennaway v. Trelevaran* (2) PARKE, B. says, "I accede to the doctrine laid down by Lord DENMAN, in the case *of *Raikes v. Todd* (3), which has been referred to, that, in all these cases, the proper course is to look at the instrument, and see whether the consideration stated in it be the same with that alleged in the declaration, and no other." Here the attempt is to vary the consideration appearing on the instrument by parol evidence, which would virtually repeal the Statute of Frauds as to this point. It was not suggested in *Raikes v. Todd* (3) that the statement of consideration could be explained by oral testimony. TINDAL, Ch. J., in his judgment in *Hawes v. Armstrong* (4), lays it down that the consideration must appear by the writing itself, if not in terms, yet so "that any person of ordinary capacity must infer from the perusal of it, that such, and no other, was the consideration upon which the undertaking was given." Here the instrument, unassisted by extrinsic evidence, discloses no legal consideration.

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(1) 7 R. R. 645 (5 East, 10).

(2) 5 M. & W. 500.

(3) 47 R. R. 513 (8 Ad. & El. 846).

(4) 1 Bing. N. C. 761.

A past consideration would be none, unless a request were shown. The second guarantee does not show even a probability that the advance therein referred to was an advance at the defendant's request. And the words "in consideration of your being in advance" do not bear out the supposition that a future advance was contemplated. In *Morris v. Stacey* (1) the consideration relied upon was collected from the guarantee itself; and in *Boehm v. Campbell* (2) DALLAS, Ch. J. and BURROUGH, J. refer to the written instrument only.

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(ALDERSON, B.: In both those cases the undertaking related to a debt already due; the consideration of forbearance might be inferred from that fact.)

In *Shortrede v. Cheek* (3) the consideration *was executory, and appeared sufficiently by the guarantee. *Stevens v. Lynch* (4), where the holder of a bill had given time to the acceptor, and the drawer waived the benefit of that circumstance, is not applicable to the present case. As to *Lee v. Muggeridge* (5), and the other cases which have turned upon moral obligation, it is sufficient to say that here no moral obligation appears for the first guarantee, and the declaration does not allege any consideration for the second guarantee but the abandonment of the first.

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Cur. adv. vult.

LORD ABINGER, C. B., in the same Vacation (June 29th) delivered the judgment of the Court:

In the case of *Brooks v. Haigh* the judgment of the Court is, to affirm the judgment of the Court of Queen's Bench.

It is the opinion of all the Court that there was in the guarantee an ambiguity that might be explained by evidence, so as to make it a valid contract, and, therefore, this was a sufficient consideration for the promise declared upon.

It is also the opinion of all the Court, with the exception of my brother MAULE, who entertained some doubt on the question, that the words both of the declaration and the plea import that the paper on which the guarantee was written was given up; and that the actual surrender of the possession of the paper to the defendant was a sufficient consideration, without reference to its contents.

Judgment affirmed.

(1) Holt, N. P. 153.

(2) 3 Moore, 15.

(3) 40 R. B. 258 (1 Ad. & El. 57).

(4) 12 East, 38.

(5) 5 Taunt. 36.

(ERROR FROM THE QUEEN'S BENCH.)

REG. v. JOHN HUMPHERY (1), ESQUIRE.

(10 Adol. & Ellis, 335—373; S. C. 2 P. & D. 691.)

Under stat. 9 Geo. IV. c. 17 (1), sects. 2 and 3, which require that every person who shall be placed, elected, or chosen in or to the office of alderman, &c., shall, within one calendar month next before or upon his admission into such office, make and subscribe a certain declaration before certain parties, and sect. 4, which enacts, that, if he shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing, election, or choice shall be void :

Held, by the Court of Queen's Bench, that the election is not void by refusal to make the declaration, or state whether the party will do so, unless he has first been admitted to the office by swearing in.

Judgment reversed on error, by the Court of Exchequer Chamber.

Held, by that Court, that the statute does not give the party elected a month at all events for deciding whether he will make the declaration or not, but only excuses him from making it at the time of admission, if he has made it within a month before.

That the words "upon his admission" mean at the time, and not within a reasonable time after, and that the authorities who admit may prescribe the order in which the ceremonies forming parts of the admission shall take place.

And that, if the party offers himself to the proper Court to be admitted, not having made the declaration within a month before, and, being asked whether he will make it or not, declines to say, but requires the Court to admit him, which they refuse, the election is thereupon void, and a precept may issue for a new election.

INFORMATION in the nature of *quo warranto*, for using and exercising the office of an alderman of the city of London.

Plea, stating, first, the rights and customs and (in part) the bye-laws, 21 Ric. II. and 13 Ann., of the city of London as to the election of aldermen, and the enactments of stat. 9 Geo. IV. c. 17, ss. 2, 3, 4 (2), that every person who shall thereafter be placed, elected, or chosen, in or to the office of mayor, alderman, &c., shall, within one calendar month next before or upon his admission into any of the aforesaid offices &c., make and subscribe the declaration specified in sect. 2, before the persons mentioned in sect. 3; and that if any person placed, &c. into any of the aforesaid offices or places shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing &c. shall be *void, and it shall not be lawful for such person to do any act in the execution of the office &c. The plea then stated,

(1) The statute upon which this case arose was repealed by 34 & 35 Vict. c. 48. But the discussion upon the effect of the language in the statute has been judicially referred to in

Paynter v. James (1867) L. R. 2 C. P. 348, 354, and in *Sidebotham v. Holland* [1895] 1 Q. B. 378, 64 L. J. Q. B. 200, 202, C. A.—R. C.

(2) More fully stated, p. 424, *post*.

1839.

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“That, since the making and passing of the said Act of Parliament made and passed in the ninth year aforesaid, the said court of mayor and aldermen have required of every person who, since the passing of the said Act, has been elected or chosen in or to the office of alderman of any ward of the said city that such person should make and subscribe the said declaration prescribed by the said Act previously to taking and subscribing the oaths of office according to the several laws made and now in force for that purpose, to wit at the city of London aforesaid:” “That, a vacancy having occurred in the place and office of alderman of the ward of Aldgate aforesaid, by the death of John Thomas Thorpe, Esq., late alderman thereof, a court of wardmote was holden on Tuesday, the 17th day of November, A.D. 1835, and continued by adjournments on other subsequent days in and for the said ward, before the Right Honourable William Taylor Copeland, then mayor of the said city, by virtue of a certain precept for that purpose before then duly issued according to the custom of the said city, for the election of an alderman of the said ward in the room and stead of the said John Thomas Thorpe; at which said court of wardmote one David Salomons, citizen and cooper, the said defendant, citizen and tallow chandler, and one James Law Jones, citizen and haberdasher, were respectively candidates for the said vacant place and office of an alderman of the ward of Aldgate aforesaid, to wit at” &c.: “That, at the said last-mentioned court of wardmote, divers persons, inhabitants of the said ward, being *a majority of those then present at the said Court, voted for the said David Salomons as and for such alderman, and by reason thereof the said D. S. claimed to be duly elected into the said place and office of alderman so vacant as aforesaid: and a return to the said precept, and of the result of the said election, was afterwards, to wit on the 24th day of November, A.D. 1835, made into the said court of mayor and aldermen then duly holden in the Guildhall of the said city, according to the custom of the said city in that behalf, to wit at” &c.: “That afterwards, to wit on the 3rd day of December, A.D. 1835, to wit at” &c., “at a court of mayor and aldermen then holden at the Guildhall in and for the said city, the said D. S. did tender himself to the said court of mayor and aldermen at the said last-mentioned Court for admission, and did then and there make claim, and did require, to be admitted to the said office of alderman of the said ward of A. as aforesaid; and thereupon the said D. S. was then and there requested by the said court of mayor and

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aldermen to make and subscribe in their presence the said declaration in the said Act mentioned, the said mayor and aldermen then being the persons in the presence of whom, by the usage of the said city, the said declaration should be made and subscribed according to the provisions of the said Act of Parliament in that behalf, according to the several laws made and now in force for that purpose; but that the said D. S. did not, nor would, at the said court of mayor and aldermen so holden as last aforesaid, nor at any time within one calendar month next before or upon his admission, according to the true intent and meaning of the said Act, into the said office of alderman of the said ward of A. as aforesaid, or at any *other time whatsoever, make and subscribe the said declaration, but wholly omitted and neglected so to do; by reason whereof, and by force of the said statute in that case" &c., "the placing, election, and choice of the said D. S. into the said place and office of alderman of the said ward of A., as aforesaid, became and was void, to wit at" &c.: "That, the said D. S. so having omitted and neglected to make and subscribe the said declaration required by the said Act of Parliament, the said court of mayor and aldermen, so holden as last aforesaid, did thereupon, at the said last-mentioned Court, declare and adjudge the election of the said D. S. into the said place and office of alderman of the said ward of A. as aforesaid to be void, and did also then and there resolve that a fresh precept should issue for a court of wardmote to be held for the election of a fit and proper person to be alderman of the said ward of A. in the room and stead of the said John Thomas Thorpe, Esq., deceased, to wit at" &c.: "That, the said vacancy in the said place and office of alderman of the said ward of A., by the death of the said John Thomas Thorpe, Esq., not having been filled up, a certain other court of wardmote was holden on Tuesday, the 8th day of December, A.D. 1835, in and for the said ward of A., before the Right Honourable William Taylor Copeland, then mayor of the said city, by virtue of a certain other precept for that purpose before then duly issued according to the custom of the said city, for the election of an alderman of the said ward in the room and stead of the said J. T. T., Esq., deceased; in which last-mentioned precept it was stated that David Salomons, Esq., returned to the court of mayor and aldermen to be alderman of the said ward, having (1)

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*omitted and neglected to make and subscribe the declaration directed to be made and subscribed by the said Act of Parliament

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made and passed in the ninth year of the reign aforesaid in manner in the said Act mentioned, by reason whereof (1) the election of the said D. S. had, by virtue of the said Act, become void, to wit at" &c. "That at the said last mentioned court of wardmote this defendant, citizen and tallow-chandler, was the only candidate for the said place and office of an alderman of the said ward of A., to wit at" &c. "That at the said last mentioned court of wardmote divers persons, being inhabitants of the said ward, and being a majority of those then present at the said Court, voted for the defendant as and for such alderman; and by reason thereof the said defendant was duly elected into the said place and office of alderman of the said ward of A., so vacant as aforesaid, and a return to the said last mentioned precept, and of the result of such last mentioned election, was afterwards, to wit on the 17th day of December, A.D. 1895, made unto the said court of mayor and aldermen then holden in the Guildhall of the said city, according to the custom of the said city in that behalf, to wit at" &c. The plea then stated that at the last mentioned Court, holden &c., that is to say, on December 17th, 1895, the defendant appeared before the Court, and, having made and subscribed the declaration, was then and there duly sworn and admitted &c., and then and there took and subscribed the oaths, and made and subscribed the declaration according to the several laws made for that purpose; by reason of which several premises he the defendant then and there took upon himself the said *place and office, &c., and from thence continually &c., and by that warrant &c. Traverse of the usurpation. Verification.

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Replication. That by the said bye-law of 13 Ann. "it was also enacted that, in case the person so duly elected alderman, and returned, by the Lord Mayor or other person duly authorized to hold such wardmote, to the said court of mayor and aldermen within the time for that purpose by the laws of the said city limited and appointed, should refuse to take upon him the said office, and unless he could discharge himself therefrom by the laws of the said city, he should be subject to all the pains and penalties which might be inflicted on him by the bye-laws and customs of the said city." That, by an act of common council of 17th April, 52 Geo. III., it was, amongst other things, enacted, "that, upon any vacancy by death or resignation of any person being an alderman of the said city of London, the lord mayor of

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the said city for the time being should, within eight days next after such death or resignation, Sundays excepted, cause a wardmote to be duly summoned and held for the election of a fit and able person to be alderman of such ward or wards respectively where such vacancy should happen, and returning such person so elected to the said court of lord mayor and aldermen of the said city. And that by the said act of common council it was also enacted that, if any person free of the said city should be thereafter duly elected alderman of any of the said wards of the said city according to the custom of the said city, and, notice of such election being given to him, or left in writing for him at the last place of his abode, shall not personally appear before the court of the lord mayor and aldermen for the time being, in the *Inner chamber of the Guildhall of the said city at the next Court there to be holden, not having a reasonable excuse for such his not appearance, and then and there to take upon himself the said office and charge of alderman of the said city and of the said ward whereof he shall be elected alderman, or if such person so elected shall, before the court of lord mayor and aldermen, openly declare his refusal to take upon him the said office, then any such person who shall so neglect or refuse to appear, or who appearing shall declare his refusal as aforesaid, shall forfeit the sum of 500*l.* of lawful " &c., " to the use of the mayor and commonalty and citizens, unless he shall be duly discharged of the said office of alderman for defect or want of ability in wealth, upon oath taken as by the said act of common council is required, which said forfeiture and penalty is by the said act declared to be recoverable by an action of debt in the name of the chamberlain of the said city for the time being in any of his Majesty's courts of record." " That, after the said return to the said precept, and of the result of the said election, was made to the said court of the mayor and aldermen, a certain notice in writing was served upon the said David Salomons by an officer of the said court of mayor and aldermen, personally to appear before the said Court on the 3rd day of December last, at the Guildhall in the said city, and then and there to take upon himself such office and charge of alderman of the said ward: and that, in pursuance of the said notice, and in obedience to the said last-mentioned act of common council, he, the said D. S., did, on the said 3rd day of December, and within the space of one month next after the day of his election to the said office of alderman of the said ward of A., present himself *to the said court of mayor and aldermen, and then and there expressed

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his readiness and desire to be sworn for the due execution of the said office of alderman, and also to take and subscribe the oaths according to the said laws made for those purposes, and to assume and take upon himself the duties and burthen of the said office, and did there demand and make claim to be admitted alderman of the said ward of A. by virtue of the said election, and of the return thereof duly made as aforesaid to the said Court." "That, when he the said D. S. so appeared and presented himself to the said Court pursuant to the said notice, the said Court demanded of him, the said D. S., whether he had signed the declaration required by the said Act of Parliament made and passed in the 9th year" &c., "entitled" &c. (9 Geo. IV. c. 17), "within the space of one month next before his then application for admission, to which the said D. S. then answered that he had not; whereupon the said Court demanded of him the said D. S. whether he would make and subscribe the said declaration: whereupon the said D. S. declined to say whether he would or not, but required the said court of mayor and aldermen to admit him to the said office, which the said court of mayor and aldermen did then and there, and within the space of one month from the day of the election of the said D. S. to the office of alderman of the said ward, positively refuse to do; and the said court of aldermen did then and there declare the election of the said D. S. to the said office to be null and void, and thereupon directed a precept to issue from the said Court for the election of another alderman for the said ward of A." And "that afterwards, to wit on the 5th day of December, and within the space of one month next after the election of the said D. S., and the return thereof to *the said court of mayor and aldermen, a certain precept issued from the said court of mayor and aldermen, and that by virtue thereof a certain court of wardmote was, on the 8th day of the said month, and within the space of one month next after the election of the said D. S. as aforesaid, holden for the said ward of A., before W. T. Copeland, then mayor of the said city, for the purpose of electing an alderman of the said ward, at which said last-mentioned wardmote the said John Humphery was declared to be elected alderman of the said ward of Aldgate." Verification.

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General demurrer, and joinder. (There were other matters replied, as to which issues of fact were joined.) The demurrer was argued in the Court of Queen's Bench in Easter Term, 1838 (1).

(1) April 25th and 27th. Before Lord Denman, Ch. J., Littledale, Patteson, and Coleridge, JJ.

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Sir J. Campbell, Attorney-General, for the defendant :v.
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The question is, whether Mr. Salomons had a right to be admitted without making the declaration. If not, the office was void, and the defendant was rightly elected; if Mr. Salomons had such a right, the office was not void, and judgment must be given for the Crown. If he could claim to be so admitted, stat. 9 Geo. IV. c. 17, s. 2, will be inoperative; and stat. 5 & 6 Will. IV. c. 28, was needless.

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By 2 stat. 13 Car. II. c. 1, s. 12, it is enacted that, after the expiration of the commission of the then corporation commissioners, "no person or persons shall for ever hereafter be placed, elected or chosen, in or to any the offices or places aforesaid" (including aldermen, and other persons bearing employment relating to the government of corporations, sect. 4), "that shall not have *within one year next before such election or choice, taken the sacrament of the Lord's Supper, according to the rites of the Church of England;" "and in default hereof, every such placing, election and choice is hereby enacted and declared to be void." This provided a preliminary test for officers. Then a subsequent test is provided by stat. 25 Car. II. c. 2, s. 2, which enacts, with respect to every person that shall be "admitted, entered, placed or taken into any office or offices civil or military," that "all and every such person and persons so to be admitted as aforesaid, shall also receive the sacrament of the Lord's Supper, according to the usage of the Church of England, within three months after his or their admittance in or receiving their said authority and employment, in some public church," &c. And stat. 16 Geo. II. c. 30, s. 3, enlarges the time given by the last-mentioned Act from three months to six months.

Stat. 9 Geo. IV. c. 17, recites these Acts, and repeals them so far as relates to taking the sacrament. It then provides substitutes, first, by ss. 2, 3, 4, for the preliminary test, and next, by sect. 5, for the subsequent test. Sect. 2 recites that "it is just and fitting, that on the repeal of such parts of the said Acts as impose the necessity of taking the sacrament of the Lord's Supper according to the rites or usage of the Church of England, as a qualification for office, a declaration to the following effect should be substituted in lieu thereof," and enacts that every person who shall thereafter be placed, elected, or chosen in or to the office of alderman, &c., "or in or to any office of magistracy, or place, trust, or employment relating to the government of any city, corporation, borough, or

cinque port within England and Wales or the town of Berwick-upon-Tweed, shall, within *one calendar month next before or upon his admission into any of the aforesaid offices or trusts, make and subscribe the declaration following: " which is the declaration, upon the true faith of a Christian, that the party will not exercise any power, authority, or influence, which he may possess by virtue of the office, to injure or weaken the Church, &c. Sect. 3 enacts " that the said declaration shall be made and subscribed as aforesaid, in the presence of such person or persons respectively, who, by the charters or usages of the said respective cities," &c., " ought to administer the oath for due execution of the said offices or places respectively, and in default of such, in the presence of two justices of the peace of the said cities," &c., " if such there be, or otherwise in the presence of two justices of the peace of the respective counties, ridings, divisions, or franchises wherein the said cities," &c., are; " which said declaration shall either be entered in a book, roll, or other record, to be kept for that purpose, or shall be filed amongst the records of the city," &c. Sect. 4 enacts " that if any person placed, elected, or chosen into any of the aforesaid offices or places, shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing, election, or choice shall be void; and that it shall not be lawful for such person to do any act in the execution of the office or place into which he shall be so chosen, elected, or placed." Sect. 5 enacts " that every person who shall hereafter be admitted into any office or employment, or who shall accept from his Majesty, his heirs and successors, any patent, grant, or commission, and who by his admittance into such office or employment or place of trust, or by his acceptance of such patent, grant, or *commission, or by the receipt of any pay, salary, fee, or wages by reason thereof, would, by the laws in force immediately before the passing of this Act, have been required to take the sacrament of the Lord's Supper according to the rites or usage of the Church of England, shall, within six calendar months after his admission to such office, employment, or place of trust, or his acceptance of such patent, grant, or commission, make and subscribe the aforesaid declaration, or in default thereof his appointment to such office, employment, or place of trust, and such patent, grant, or commission, shall be wholly void."

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Now, in interpreting sects. 2, 3, 4, which provide the substitute for the preliminary test, the only sound principle must be to

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(LITLEDALE, J.: "Upon" there rather means "on condition of.")

It would mean a condition precedent.

(PATTESON, J.: According to your argument the declaration here should follow the admission.)

[*347] The use of the word is various; *here it seems to mean either "at the time," or "before."

(COLERIDGE, J.: If it meant "before," the words would mean one month "before or before the admission.")

"Upon" would not then be merely superfluous: the effect of the enactment would be that the party, if he had not made the declaration within one month of the admission, must do it immediately before the act of admission. Or it might mean "at the time of" the admission. Then the order in which the concurrent acts of a single proceeding are to take place is clearly to be regulated by the party presiding over such proceeding. Therefore the court of aldermen were justified in treating Mr. Salomons's refusal, either to make the declaration or to say whether he would or would not make it, as a refusal to make it at the time of the admission; so that the election, by sect. 4, was void.

It may be argued that "one calendar month next before or upon his admission" means a month before or a month after; and that, therefore, Mr. Humphrey ought not to have been elected and

admitted within the month, Mr. Salomons having that time for making the declaration. But this construction is not borne out by the language; nor can the Legislature be supposed to have meant that a party, after his election, should have a month given him for the purpose of considering his religious or other objections to the declaration. He is supposed to be qualified at the time of the election. What was to be done, as to the office, in the mean time? It is immaterial how soon after Mr. Salomons's refusal the defendant's election took place.

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Sect. 5 of stat. 9 Geo. IV. c. 17, provides a subsequent test, in lieu of the subsequent test given by stat. 25 Car. II. c. 2, s. 2, to the provisions of which it manifestly refers. *This shows that sects. 2, 3, 4, of stat. 9 Geo. IV. c. 17, were intended to furnish a substitute for the enactments of 2 stat. 13 Car. II. c. 1, s. 12, which created a preliminary test. And, as sect. 5 of stat. 9 Geo. IV. c. 17, provides for making the declaration within six months after the admission, it cannot be supposed that sect. 2 meant also to order a declaration to be made within one month after the admission. Sect. 2 relates to a declaration to be made before, sect. 5 to a declaration after, being admitted.

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(PATTESON, J.: Was a person to make two such declarations? Do the enactments refer to the same persons? Did stat. 25 Car. II. c. 2, s. 2, relate to corporation officers?)

The words are, "any office or offices civil or military," which clearly include corporation offices. If the words "by reason of any patent or grant of his Majesty" are taken to govern all that precede, still offices in a chartered corporation are held under a grant of the Crown, and so within the clause.

The Legislature must have introduced stat. 9 Geo. IV. c. 17, with the knowledge that an annual Indemnity Act has always been passed, since 1743. The Indemnity Act in force at the time of Mr. Salomons's election was stat. 5 & 6 Will. IV. c. 11 (1). The

(1) The same, in all parts material to the present case, with stat. 1 Will. IV. c. 26, except as to dates. The enactment is, "That all and every person or persons who, at or before the passing of this Act, hath or shall have omitted to take and subscribe the oaths and declarations, or otherwise to qualify him, her, or themselves, within such time and in such manner

as in and by the said Acts" (including 2 stat. 13 Car. II. c. 1, 25 Car. II. c. 2, 9 Geo. IV. c. 17, 10 Geo. IV. c. 7) "or any of them is required, and who, after accepting any such office, place, or employment, or undertaking any profession or thing, on account of which such qualification ought to have been had and is required, before the passing of this Act hath or have

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Act of Indemnity, after reciting (among others) 2 stat. 18 Car. II. c. 1, stat. 25 Car. II. *c. 2, and stat. 9 Geo. IV. c. 17, indemnifies parties who have accepted office without taking the oaths or making the declaration in proper time, if they have subsequently done so, or do so by a day named, before which the next Indemnity Act always passes. Therefore, if Mr. Salomons had been admitted without making the declaration, the security intended by stat. 9 Geo. IV. c. 17, would never have taken effect at all.

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Stat. 5 & 6 Will. IV. c. 28, recites stat. 9 Geo. IV. c. 17, ss. 2, 4, and that there was a doubt whether these clauses *applied to sheriffs of cities, or towns being counties; and it enacts that no person elected to such office of sheriff shall by reason thereof "be liable to make or subscribe the aforesaid declaration within one calendar month next before or upon his admission to the said office." But this would have been unnecessary, if an officer, under the enactments of stat. 9 Geo. IV. c. 17, s. 2, might postpone the declaration

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taken and subscribed the said oath or made the declarations required by *law, or who, on or before the 25th day of March, 1836, shall take and subscribe the oaths, declarations, and assurance respectively, in such cases wherein by the said several Acts or any or either of them the said oaths, declarations, and assurance ought to have been taken and subscribed, in such manner and form, and at or in such place or places, as are appointed in and by the said several Acts or any or either of them, shall be and are hereby indemnified, freed, and discharged from and against all penalties, forfeitures, incapacities, and disabilities incurred or to be incurred for or by reason of any neglect or omission, previous to the passing of this Act, of taking or subscribing the said oaths or assurance, or making or subscribing the said declarations respectively, or taking or subscribing the said oath, according to the above-mentioned Acts or any of them, or any other Act or Acts; and such person or persons is and are and shall be fully and actually recapitulated and restored to the same state and condition as he, she, or they were in

before such neglect or omission, and shall be and be deemed and adjudged to have duly qualified him, her, or themselves according to the above-mentioned Acts and every of them; and that all elections of, and acts done or to be done by, any such person or persons, or by authority derived from him, her, or them, are and shall be of the same force and validity as the same or any of them would have been if such person or persons respectively had taken the said oaths or assurance, and made and subscribed the said declarations respectively, and taken and subscribed the said oath, according to the directions of the said Acts and every or any of them; and that the qualification of such person or persons qualifying themselves in manner and within the time appointed by this Act shall be to all intents and purposes as effectual as if such person or persons had respectively taken the said oaths and assurance, and made and subscribed the said declarations respectively, and taken and subscribed the said oath, within the time and in the manner appointed by the several Acts before mentioned."

till after admission; since, after admission, he would have been protected by the annual Indemnity Act.

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By the Roman Catholic Emancipation Act, stat. 10 Geo. IV. c. 7, s. 14, Roman Catholics are enabled to hold office, &c., in corporations, "upon" taking and subscribing the oath there set forth. It may be shown that this oath must be taken before admission; and sect. 2, as to members of either House of Parliament, is to be construed in the same way.

(*Sir F. Pollock*, for the Crown, assented to this.)

The intention of the Legislature must have been the same here as in stat. 9 Geo. IV. c. 17, though the expressions are not strictly alike.

It will be argued that Mr. Salomons is protected by the annual Indemnity Act. But he is not within its terms. He has not been admitted. The case which has gone farthest on these Acts is *In the Matter of Steavenson* (1), where it was held that the Act protected, not only those who had already incurred the penalties or disabilities, but all who should do so while the Act was in force. There the party was elected and admitted after the Act passed. But here the penalty has not been incurred at all; Mr. Salomons never has been in the office.

(LORD DENMAN, Ch. J.: Suppose he had a right to be *admitted when he claimed.) [*351]

This claim would not subject him to the penalty: and the Act would still be inapplicable. But, further, Mr. Salomons cannot claim the benefit of the Act, because he has not complied with the conditions; it is not alleged either that he has made the declaration, or that he is ready to do so. *Rex v. Parry* (2) shows what allegations are necessary to bring a party within the protection of the Act.

Sir F. Pollock, contra:

The question is, not simply whether Mr. Salomons had a right to be admitted before making the declaration, but whether his election was avoided by his refusing to answer the question, so that the Court were entitled to issue a precept for a new one.

The Indemnity Act has nothing to do with the interpretation of stat. 9 Geo. IV. c. 17. It has been, in fact, passed annually for a long time; but it does not thereby become part of the permanent

(1) 2 B. & C. 34.

(2) 14 East, 594.

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law ; and its operation is made temporary only, with the intention that it shall not constitute such part of the law. According to the view suggested on the other side, its effect would be altogether to repeal the laws on the subject of qualifications and tests.

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The word "upon" in sect. 2 of stat. 9 Geo. IV. c. 17, cannot mean "before." Its proper meaning is "after" or "as a consequence of." Numerous meanings are assigned to it in Johnson's Dictionary : but "before" is not among them. There is indeed, "at the time of ; on occasion of." But Johnson adds, "It always retains an intimation, more or less obscure, of some *substratum, something precedent, or some subject." This agrees with the ordinary legal use of it, where the word is always followed by some condition or act which is to be precedent: as "a new trial upon payment of costs," where the payment of costs, as a condition or act, precedes the new trial. The argument that sect. 2 provided a substitute for that which, under the previous law, preceded the admission, namely, the taking the sacrament, cannot controul the ordinary sense of the word, especially in the interpretation of an Act which restricts general rights. But, further, the declaration was a substitute for all the tests before imposed.

(PATTESON, J. : The preamble in sect. 2 makes the declaration a substitute for taking the sacrament "as a qualification for office.")

That does not show that the declaration is to precede the taking of office : it is a substitute for all that was required by 2 stat. 13 Car. II. c. 1, s. 12, and stat. 25 Car. II. c. 2, s. 2. Even assuming that the declaration was to be made at the time of admission, why was the question to be put before the admission ?

(COLERIDGE, J. : Were not the court of aldermen to regulate the order of proceedings ?)

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If the declaration made a part of one transaction, concurrently with the admission, Mr. Salomons might, at any time while that Court was sitting, make the declaration ; therefore the precept which issued at the following Court, in consequence of the resolution passed at the first Court and the declaration there made that the election was void, was illegal. While the first Court was sitting, the election could not be void. Even had Mr. Salomons, on the question being put, stated that he would not make the declaration, he might still have changed his mind, and have offered to *do so while the first Court was sitting.

(COLERIDGE, J.: Suppose two persons had been elected to different offices, and each had refused to be admitted first, how could the court of aldermen proceed? What was to be done first?)

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That state of things did not in fact exist; and, had it arisen, it would have been premature to declare the election void. No moment can be pointed out at which the election became void, until the first Court had broken up. The bye-law of 13 Anne does not avoid the election, even upon the refusal of the party to take upon him the office; it only imposes penalties. Besides, it does not apply to a party claiming admission. Had Mr. Salomons not appeared at all at the first Court, the election would not have been void; and therefore the precept under which the defendant was elected would have been illegal.

(LITLEDALE, J.: But Mr. Salomons did appear.)

Still nothing passed, on his appearance, making the election null. There is no provision, by statute or bye-law, avoiding the election under such circumstances; for stat. 9 Geo. IV. c. 17, s. 4, avoids it only upon the party's omission or neglect, and the refusal to answer the question is neither omission nor neglect to make the declaration. Neither can there be any common law principle avoiding the election. The Court had no right to put the question; Mr. Salomons might answer, "You are to admit, and, upon my admission, I am to make a declaration; if I omit or neglect to do that, my election will be void: do your duty, and let me do mine."

(COLERIDGE, J.: If Mr. Salomons had refused to answer the question whether he had already made the declaration, could the Court thereupon have declared the election void?)

They clearly could not.

(PATTERSON, J.: Would you say that also as to the sacramental *test, under 2 stat. 13 Car. II. c. 1, s. 12, which was necessarily taken before admission?)

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The Court, who were to admit, would have had no right there to put the question; it was for the party admitted to see that he had done all necessary to make his admission good; and, supposing the Court (if the case had occurred under that statute), to have adjourned without declaring the election void, Mr. Salomons might have claimed admission at the following Court, and have made the

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declaration. But, according to the argument on the other side, had he been then admitted, he could have been ousted by a *quo warranto*, the election having been avoided by what occurred at the previous Court; for the declaration of avoidance by the court of aldermen can make no difference. Possibly, if he had been admitted, and then refused to make the declaration, the election would have been thereby avoided: but that has not occurred.

Sir J. Campbell, Attorney-General, in reply:

It must be taken, on this record, that Mr. Salomons refused to make the declaration. The plea states that, on being required to make and subscribe it, he did not, nor would, at the Court, nor at any time within one calendar month next before or upon his admission, according to the true intent or meaning of the Act, or at any other time whatsoever, make and subscribe the said declaration, but wholly neglected and omitted so to do, whereby the election became void, by force of the statute. This is not traversed, but only, to a certain degree, explained in the replication. There is, therefore, a refusal on the record; and the only question is, whether the refusal avoided the election.

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It is denied, on the part of the Crown, that sect. 2 of stat. 9 Geo. IV. c. 17, points to a substitute for the prior test in 2 stat. 13 Car. II. c. 1, s. 12, rather than for the subsequent test in stat. 25 Car. II. c. 2, s. 2: but the prior test was the only one provided "as a qualification for office," which are the words used in the preamble to sect. 2 of stat. 9 Geo. IV. c. 17; it is, therefore, to that statute only that the section applies.

By 2 stat. 13 Car. II. c. 1, s. 13, it is enacted "that every person who shall be placed in any corporation by virtue of this Act, shall upon his admission take the oath or oaths usually taken by the members of such corporation." Could it be contended that the party was to be admitted first, and take the oaths afterwards?

(LORD DENMAN, Ch. J.: On comparing sect. 12 with sect. 13, it does not appear that any order of proceedings is prescribed.)

The legal interpretation has always been that the oaths of office should be taken before the admission.

(COLERIDGE, J.: Does the admission consist in any thing besides administering the oath of office?)

It seems to be a series of acts ; but the last probably is the subscription of the name in the books of the corporation.

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(COLERIDGE, J. : Can that be essential to his being an alderman ?)

In the pleadings in *quo warranto* there were usually two issues, one traversing the swearing in, the other traversing the admission.

Then, the court of aldermen were bound to make the enquiry ; for, by sect. 3 of stat. 9 Geo. IV. c. 17, the party, if he does not make the declaration before those who are to administer the oath of office, is to take it before justices.

(LORD DENMAN, Ch. J. : The words are “in default of such :” that looks as if what took place before those who administer the oath of office was not necessarily final.)

Those words determine nothing as *to the time ; they show only before whom the declaration is to be made, whatever be the proper time. It cannot be contended that, after admission by the court of aldermen, the party could go and take the oaths elsewhere.

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(LORD DENMAN, Ch. J. : Could the officer who admits defeat the election by quitting the Court without receiving the declaration ?)

That case seems not to be provided for by the Act. It is said that, under the old law, the party was not bound to answer the question whether he had taken the sacramental test ; but that seems to be contrary to *Rex v. Hawkins* (1).

(PATTESON, J. : Could he make the declaration previously to the Court at which he is admitted ? Can the words “in default” leave the matter to the option of the parties ?)

They seem to mean “in the place of.”

(LORD DENMAN, Ch. J. : Suppose the party answered the question as to the sacramental test in the affirmative, must the Court have received his answer, or could they enquire further ?)

He would answer at his own peril. In *Rex v. Hawkins* (1) Lord ELLENBOROUGH, upon the authority of *Williams v. The East India Company* (2), considers that a party must be presumed to have taken the test, if he so declare.

(1) 10 East, 211.

(2) 6 B. R. 589 (3 East, 192).

REG. (PATTESON, J.: It was, in some cases, usual for the party
 v. to bring some one with him who had seen him receive the
 HUMPHREY. sacrament.)

By stat. 25 Car. II. c. 2, s. 3, a certificate was required as to the subsequent test.

It is asked at what period the vacancy took place? It took place at the moment of the refusal being made. There is no occasion to enquire whether, if the Court had adjourned for the purpose of not allowing the proceeding to be final, the vacancy would have been consummated.

Cur. adv. vult.

[357] LORD DENMAN, Ch. J., in the following Term (May 29th, 1838), delivered the judgment of the COURT. After stating the information, his Lordship proceeded as follows:

The question on the pleadings turned out to be, whether the office of alderman, to which the defendant was elected, was or was not vacant at the time of such election; and this mainly depended upon whether the court of aldermen had done right in refusing to admit Mr. Salomons, who had before been duly elected alderman of the same ward, and directing a new precept to go for the election of another alderman, under which new precept the defendant was elected. The ground of their refusal to admit him was, that he had forfeited his office by the operation of the statute 9 Geo. IV. c. 17, inasmuch as he had not made the declaration required by that statute within a month, and, when questioned, declined to answer whether he was willing to make it on being admitted.

On looking at the statute, we are of opinion that, as the declaration is to be made upon admission, and to be made in the presence of those who by charter or custom are to administer the oaths of office, the admission is the first thing to be done; that the court of aldermen ought to have admitted him by administering the oaths of office; that he, when so admitted, had the option of making or declining to make the declaration; and that, till he had declined upon admission, none of the consequences attached by the Act to refusal accrued. We therefore think the office was not vacant at the time when the precept issued, and of course that the defendant has not been well elected. Our judgment must be for the Crown.

Judgment for the Crown.

A writ of error was brought upon this judgment. The errors assigned were, that the plea first pleaded in reply was insufficient in law: that, when the precept issued on December 5th, 1835, for electing an alderman of the ward of Aldgate, the said office was vacant, and that the election of the said John Humphery thereupon was legal and good: and that judgment was given for the Crown, whereas, &c. (the common assignment of error). The writ of error was argued in Hilary Vacation, 1839, February 4th, before Tindal, Ch. J., Bosanquet, Vaughan, and Coltman, JJ., and Parke, Alderson, and Gurney, Barons.

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Sir J. Campbell, Attorney-General, for the plaintiff in error,
the defendant below :

The judgment of the Court below repeals the clauses of 9 Geo. IV. c. 17, which require a declaration in lieu of the sacramental test, and defeats the purpose of the Legislature, which was, when abolishing that test, to provide, by means of the substituted declaration, that the offices specified should not be filled by persons who could not profess that they were Christians. Such a construction is inconsistent with the policy of stat. 5 & 6 Will. IV. c. 76, s. 50, which retains the declaration, and would have made it needless to introduce the Act 5 & 6 Will. IV. c. 28, which was passed on Mr. Salomons being elected sheriff of London. It is contended for the Crown that the practice alleged in the plea to have prevailed ever since the statute 9 Geo. IV. c. 17, was passed, of requiring every person elected alderman to subscribe the declaration before taking the oaths of office, is illegal, and that the party elected may require the oaths to be administered first. The defendant insists that, if administering the oaths is the admission, and it is consummated by that act, the declaration *ought to be made first; and, further, if it is necessary to argue that point, that the declaration is part of the ceremonies of admission; that the admission is not consummated without it; that the lord mayor and aldermen may direct the order in which the ceremonies shall be performed; and that, if they require the declaration to be made first, and the party elected refuse then to make it, the election is thereby void.

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As to the first point; the judgment of the Court below does not enter into any discussion of the statute 9 Geo. IV. c. 17, of the other Acts *in pari materiâ*, or of the Indemnity Acts; and these do not appear to have been sufficiently considered. Not only particular

REG. words or enactments, but the whole scheme and tendency of these
 v. Acts should be looked at. (He then commented on the several
 HUMPHREY. statutes, taking the same course of argument as before the Court below.)

(ALDERSON, B. observed that stat. 9 Geo. IV. c. 17, s. 2, required the declaration to be made by every person who should be “placed, elected, or chosen” (not admitted) “in or to the office of mayor, alderman,” &c.; and sect. 4 made such “placing, election or choice” void, in case of omission.)

[*360] It is contended for the Crown that the lord mayor and aldermen, in giving the admission, exercise only a ministerial function, are not authorised to put a question to the candidate, and must leave him to make the declaration at whatever time he pleases. But it was their right and duty to enquire whether he had signed the declaration. They were to see the law properly enforced; and the election was void if the declaration was not made within a month next before, or upon, the admission. Under the old law, according to *Rex v. Hawkins* (1), *a candidate for the office of alderman might be asked even by an individual elector, at the time of election, whether he had taken the sacrament within a year. The word “upon” may be so used as to signify after; but it may also mean before or at the time; and it must receive a reasonable construction, according to the nature of the thing to be done, and the object for which it is required. Making the declaration after being admitted would be no test. If the candidate, on coming to be admitted, states that he has not made the declaration, and, on being asked then to make it, refuses, the election is void *eo instanti*; the statutes nowhere require the interval of a month before another person can be elected. (Nothing material was added, on this point, to the argument below.) Secondly, the true construction being that the declaration shall be made at the time of admission, it forms one of the acts in which the admission consists; and the Court before which that ceremony takes place must regulate its order. An attorney, on being admitted in this Court, could not claim to determine whether he should take the attorney’s oath or the oath of allegiance first. There is no hardship in requiring that the candidate shall be ready at once to say, whether he objects to the declaration; and it would be very inconvenient, where there were

several persons, if all might reserve their answer on this point till the last moment of the Court's sitting. It may be contended that stat. 9 Geo. IV. c. 17, must be strictly construed, being penal. It is not, however, properly penal, for it is a relaxation of former penal Acts; and the conditions of that relaxation ought not to be explained away.

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Sir F. Pollock, contra :

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As to the last argument, although this Act relaxes some provisions of the earlier statutes, it still imposes restraints which did not originally exist, and is so far against common law rights, and therefore to be construed strictly. The observation, that the judgment below will impliedly repeal stat. 9 Geo. IV. c. 17, supposes that an Indemnity Act will pass every year : but that is not to be assumed; and the statute must be construed according to its own language. This Act substitutes certain provisions for those of the Corporation and Test Acts; but it does not follow that the enactments of those statutes furnish a rule for construing the Acts substituted for them. The question is, whether, under the present Act, the court of lord mayor and aldermen had a right to pronounce the election of Mr. Salomons void on his refusal, before admission, to say that he would make the declaration. A distinction was suggested from the Bench, during this argument, between the words "placed" in sects. 2 and 4, and "admitted" in sect. 5.

(ALDERSON, B.: "Placed" probably means an appointment in any other mode than by election.)

The words "placing, election, or choice" seem to have been adopted from 2 stat. 13 Car. II. c. 1, s. 12. "Placing" is opposed to "removing," in the preamble to that Act, in a manner which seems to imply an admission.

(ALDERSON, B.: Sect. 13 of that statute enacts, "That every person who shall be placed in any corporation by virtue of this Act, shall upon his admission take the oath or oaths usually taken by the members of such corporation." The statute probably used the general term "placing" as applicable to whoever might have the power to place in the particular office. Sect. 9 shows this; and, under the old corporation law, if a charter *expired and a new corporation was constituted, the new officers would be placed by the Crown.)

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It is at least so far doubtful whether placing does not include admission, that no inference can safely be drawn, from the use of this word, in favour of the defendant's construction of stat. 9 Geo. IV. c. 17, ss. 2, 4. Then, further, the pleadings here do not show that the office had become void when the defendant was elected. It is nowhere said that Salomons refused to make the declaration. He omitted to do so at the Court holden on December 3rd; but, by the statute, he should have had a month for doing it, from the time of his election. At the Court in question the functions of the lord mayor and aldermen, as to admitting, were ministerial only.

(TINDAL, Ch. J.: If they had actually admitted, it does not seem certain that the admission would have been void, as sect. 4 of stat. 9 Geo. IV. c. 17, avoids only the "placing, election, or choice.")

Supposing, as is contended on the other side, that taking the declaration is part of the proceedings on admission, yet, in point of order, it ought to follow the act of admitting. "Upon," here, means "after, within a reasonable time." By stat. 10 Geo. IV. c. 7, s. 14, Roman Catholics may hold office *upon* taking certain oaths: that clearly means *after*. The same construction prevails where a settlement is to be made upon marriage, or a penalty to accrue upon conviction, or upon default or refusal.

(BOSANQUET, J.: So, where a reward is to be paid upon conviction of an offender.

ALDERSON, B.: In most of the cases put, "upon" is used elliptically for "upon condition of."

PARKE, B.: Where a thing is to be done "upon payment of costs," it is so.

TINDAL, Ch. J.: There are instances where it refers to consideration. In the case of copyhold fines, "on admission" has been held *to mean "after."

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It never means "before." The lord mayor and aldermen in this case should, at least, have expressed an intention to admit Mr. Salomons if he would make the declaration. As the case stands upon the pleadings, he calls on them to admit him; they, in answer, demand of him whether he has signed the declaration; he replies that he has not: they ask if he will do so; he declines

to say whether he will or not, but requires them to admit: they refuse to do so, and thereupon declare the election void, and direct a precept for a new one. It is not necessary even to contend that they ought to have admitted him first, and then tendered the declaration: it is enough to say, that on his answering, "I will not tell you whether I will subscribe or not," the office was not void. This was not an omitting or neglecting to make the declaration, within stat. 9 Geo. IV. c. 17, s. 4. The question is, at what moment the office can be said to have become void? It did not upon Mr. Salomons's refusal to say whether he would make the declaration or not; for he might afterwards have offered to do it.

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(TINDAL, Ch. J.: That would have altered the case very much; but it is not stated that he did.)

He retained the right. The vacancy ought not to have been declared till another Court was holden.

(PARKE, B.: Has the declaration of a vacancy any effect? If the office was void by law, was any judgment of the mayor and aldermen required?)

At any rate, when he declined to say whether he would subscribe or not, they might, at his request, have adjourned, to give him time; and, if so, the office was not already void. But, even if it was void within sect. 4, it was not so to all intents, until legally called in question and determined. Sect. 9 shows that, for some purposes, the party might *be an efficient officer.

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(ALDERSON, B. cited *The Margate Pier Company v. Hannam* (1).)

Sir J. Campbell, Attorney-General, in reply:

The relator must establish that there could be no vacancy till a month had elapsed after the election, however positively the party elected might say that he never would make the declaration. Here, the conduct amounted to a refusal.

(ALDERSON, B.: The object contemplated in using the words "within one calendar month next before or upon his admission" was to allow the benefit of a declaration made before the admission, but yet to bring it as near as possible to the time of admitting, that

(1) 22 R. R. 378 (3 B. & Ald. 266). those used in the Court below, are
Some of the arguments for the omitted.
Crown, not materially differing from

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it might not be suggested that the party had changed his mind in the interim. The words cannot have been intended to protect parties who hesitated whether they should make the declaration at all.)

The word "placed" means, simply, "appointed without election," as in the case of a new charter, and in other instances, where the Crown nominates. Sect. 9 of stat. 9 Geo. IV. c. 17, gives validity to certain acts, but that is where they are done ignorantly; and the protection is for the benefit, not of the party exercising an office, but of those claiming under him.

(PARKE, B. : You say that when the party applies for admission, and omits to make the declaration, the office is void. Suppose he does not appear at the first or second Court after his election; if he applies for admission at the third, has the office become void?)

Not if he has never appeared; but if he comes, voluntarily or otherwise, and then does not make the declaration, it is void.

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*Then as to the effect of the word "upon."

(ALDERSON, B. : The question must always be, whether the thing to be done, which follows that word, is made a condition or not.)

That is so, whatever be the form of expression. Here, making the declaration is the condition of being admitted.

(PARKE, B. : You say that he never has more than one option of being admitted or not.)

There is no reason that, when he appears, he should have more. As to declaring the avoidance, there is no need that the lord mayor and aldermen should do it; the law itself makes the adjudication.

Cur. adv. vult.

TINDAL, Ch. J. in this Term, June 4th, delivered the judgment of the COURT :

In this case, the Court of Queen's Bench gave judgment in favour of the Crown upon a *quo warranto* information filed against the defendant, for exercising the office of alderman of the ward of Aldgate, in the city of London. The pleadings raise the question on demurrer, whether, at the time of issuing the precept by virtue of which the defendant below was elected alderman, the office was void, by reason of Mr. Salomons, who had been elected alderman of

that ward upon a vacancy by death, having neglected to comply with the provisions of stat. 9 Geo. IV. c. 17, s. 2.

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Mr. Salomons had not made and subscribed the declaration, required by that Act, before he tendered himself to the court of mayor and aldermen for admission into the office of alderman; and upon his so tendering himself, as it is averred in the plea, "the said David Salomons was then and there requested by the said court of mayor and aldermen to make and subscribe in their *presence the said declaration in the said Act mentioned," but "the said David Salomons did not, nor would, at the said court of mayor and aldermen so holden as last aforesaid, nor at any time within one calendar month next before or upon his admission," "into the said office of alderman," "or at any other time whatsoever, make and subscribe the said declaration, but wholly omitted and neglected so to do."

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The replication does not traverse this omission and neglect, but states the special circumstances, viz. that, within the space of one month next after the day of his election, he presented himself to the court of mayor and aldermen, and demanded and made claim to be admitted; and that the Court demanded of him whether he had signed the declaration required by the said Act within the space of one month next before his then application for admission; to which he answered, that he had not: whereupon the Court demanded of him whether he would make and subscribe the said declaration; whereupon the said David Salomons declined to say whether he would or not, but required the said Court to admit him to the said office, which the said Court, then and there, and within the space of one month from the election of the said David Salomons to the said office of alderman, positively refused to do; and the said Court then and there declared the election of the said David Salomons to the said office to be null and void.

Upon this state of the pleadings, the Court is bound to assume that he omitted to make and subscribe the declaration at the time when the Court required him to do so; because the allegation in the plea, that he did so omit and neglect, is not traversed, and it is expressly alleged in the replication that he would not say whether *he would do so or not after he should be admitted; and the question therefore becomes this, whether, by reason of such omission and neglect, Mr. Salomons's election became void: which question depends upon the construction which must be put upon the Act of Parliament, as to the time at which the declaration required by the statute must be subscribed and made.

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The statute 9 Geo. IV. c. 17, after referring, in the first section, to the Acts usually called the Corporation and Test Acts, and reciting the expediency of repealing so much of them as imposes the necessity of taking the sacrament of the Lord's Supper according to the rites or usages of the Church of England, proceeds to repeal such parts of the said Acts. The section, after reciting that the Protestant Episcopal Church of England and Ireland, and the doctrine, discipline, and government thereof, and the Protestant Presbyterian Church of Scotland, and the doctrine, discipline, and government thereof, are by the laws of this realm severally established, permanently and inviolably, and that it was just and fitting that, on the repeal of such parts of the said Acts as impose the necessity of taking the sacrament as a qualification for office, a declaration, which is afterwards set forth, should be substituted in lieu thereof, proceeds to order, "That every person who shall hereafter be placed, elected, or chosen in or to the office of mayor, alderman," &c., "or in or to any office of magistracy, or place, trust, or employment relating to the government of any city," &c., "within England and Wales or the town of Berwick-upon-Tweed, shall, within one calendar month next before or upon his admission into any of the aforesaid offices or trusts, make and subscribe the declaration" therein set forth.

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The third section specifies in the presence of what *persons the said declaration shall be made and subscribed; and the fourth enacts that, "if any person placed, elected, or chosen into any of the aforesaid offices or places, shall omit or neglect to make and subscribe the said declaration in manner above-mentioned, such placing, election, or choice shall be void; and that it shall not be lawful for such person to do any act in the execution of the office or place into which he shall be so chosen, elected, or placed."

It is clear, from these recitals and provisions, that the Legislature meant to open as well corporate offices as places in the gift and appointment of the Crown to every person professing the Christian faith, instead of confining them, as before had been the case, to those only who were willing to take the sacramental test: but it is equally clear that it intended that no one should exercise such an office unless he made and subscribed, at the proper time, the declaration which is substituted instead of such sacramental test: and the only difficulty which is raised upon this record is, whether the proper time had arrived for holding the election of Mr. Salomons

to be void, when he was required by the court of mayor and aldermen to make and subscribe the declaration prescribed by the Act, and when he omitted and neglected so to do.

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And we are all of opinion that, upon the proper construction of the Act, such time had then arrived, and that the non-compliance of Mr. Salomons with such requisition of the Court made his election to the office of alderman, *ipso facto*, void.

Upon two points which have been made in the course of the argument, on the part of the Crown, we have entertained no doubt. We think it clear that the statute *did not intend, by the second section, to give the period of one entire month to the person elected, within which he might decide whether he would make the declaration or not; and that the objection, that one month had not elapsed in this case between the election of Mr. Salomons and the application to be admitted, is entirely without foundation. The statute never could anticipate that any one would offer himself as a candidate for the office who had not already made up his mind to subscribe the declaration imposed by law; and the plain object of the provision contained in the second section appears to us to be that, if, at the time of being admitted, the person elected has already made the declaration so recently as within one month next before (but not at an anterior period), such making of the declaration shall be sufficient, and he cannot be called upon to make it again. Neither have we any doubt upon another point which was raised in the course of the argument, namely, that the Legislature did not intend to give to the person elected a reasonable time after admission, for the purpose of making the declaration; for, in the first place, such are not the words of the Act; nor could the Legislature have ever contemplated that the propriety of making or not making the declaration was a subject which required any time for consideration. The words of the Act, "upon his admission," do not, as it appears to us, mean after the admission has taken place, but upon the occasion of, or at the time of his admission: the words of that section show the intention of the Legislature to have been that the space of time commencing at the distance of one calendar month next before, and terminating with, the act of admission, should be the limit or period within which the declaration *was required to be made; so that, if not made at an earlier time, the latest opportunity for making it would be at the same time and place at which the oath of office was administered, and before the same persons. In effect, the making of the declaration does, by virtue of those

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words, form a part of the act of admission, and is an essential requisite to the being permitted to exercise the corporate office. And we hold it therefore to be unnecessary to refer to instances of the legal meaning of the word "upon," which, in different cases, may undoubtedly either mean before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require the interpretation, with reference to the context, and the subject-matter of the enactment. And consequently, if immediately after having been admitted in the same way as if this Act had not been passed, Mr. Salomons had omitted and neglected to make the declaration, his election would unquestionably have been void, and it would have become the duty of the court of mayor and aldermen to have forthwith issued a precept for a new election.

But the point upon which the doubt, and the only doubt, in this case has arisen in our minds is, whether, upon the strict interpretation of the wording of the Act, the election became void by the mere offer of the party elected to be admitted at the proper time when he ought to have been admitted, and by his omission or neglect at that time to make and subscribe the declaration required ; or whether, as no admission had actually taken place in the old corporate form, that is, by taking the oath of office, the occasion had arisen upon which *he was bound to make the declaration and the Court had the power to declare the election to be void.

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It seems, however, to us, that the more reasonable construction of the Act, and the construction which will best effectuate the intentions of the Legislature, is, that, if the person elected (not having qualified within the preceding month by making the declaration) be not ready (and much more if he decline to say whether he will so do or not) to make and subscribe the declaration, as well as take the corporate oaths, at the time and place when his admission ought to take place according to the charter, bye-law, law, or usage of the corporation, no complete or valid admission can take place at all ; his admission could be at most but an idle form, since he cannot be permitted, under section 4, "to do any act in the execution of the office ;" and that his election thereby becomes void. The declaration comes in lieu of the sacramental test ; which, in the case of corporate offices, must have been taken, not only before the admission, but even the election of the party ; it is a test of the required qualification for the office, both as indicating the religious faith of the party, and furnishing a security, by his

solemn promise, against any injury to the Protestant Church and its establishments. And, as the precise order in which each part of the act of admission is to take place is not defined by the statute, it is reasonable to hold, where there is any doubt as to which should precede the other, that the court of mayor and aldermen, being the proper Court to give the admission, may prescribe the order in which the respective parts of the admission shall be arranged; that they may first ascertain the qualification before they administer the oath of office, instead of adopting the course, which *might be useless, and which, if useless, would be improper, and might even lead to inconvenience,—that of first administering the oath, and afterwards ascertaining the qualification. There is no reason, therefore, why the admission, by administering the corporate oath of office, should first take place before the statutory declaration is made, but the contrary, as thereby this great inconvenience would follow, that the time during which the corporation remains without an officer must be unnecessarily extended.

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And we think this construction is entirely consistent with the words of the statute. The second section is formed upon the supposition that the party elected will be completely admitted, and requires that he make the declaration either within a given time before, or at the time and on the occasion of his admission, superadding a new requisite to the old corporate form of admission. It is the fourth section which provides for the consequences of an omission or neglect to make that declaration. It enacts that, if the person elected shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing, election, or choice shall be void. The question, therefore, upon the words of this section, is, what is the proper meaning of the general words of reference, “in manner above mentioned?” And, coupling those words with the context, we think we are not bound to say that they mean at the time when a corporate admission has been actually completed; when it is clear from the context that an actual admission cannot be an available admission, unless the declaration is made, and that the person elected cannot, without such declaration made, exercise any corporate functions.

It is also not unworthy of observation that the words of the fourth section do not in terms provide that the admission shall be void, but the election only (for the word “placing” has no reference to admission, but only to appointment or title by any other mode

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than election or choice); and it can scarcely be conceived that, if an actual admission had been contemplated, the Legislature would not have declared such admission to be void, by the refusal or omission to make the declaration.

Upon the whole, therefore, we hold the meaning of the statute to be, that it makes void the election, if the person elected (not having previously qualified within a calendar month) should omit or neglect to qualify himself by making the declaration at the time and occasion when he ought to be admitted; and that the useless form of a corporate admission is not necessary before the party can be called on to qualify according to the statute, and before the election can by law be declared to be void.

We therefore think that the judgment of the Court of Queen's Bench ought to be reversed.

Judgment reversed.

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REG. v. THE LORDS COMMISSIONERS OF HER MAJESTY'S TREASURY.

IN THE MATTER OF TIBBITS.

(10 Adol. & Ellis, 374—385; S. C. 2 P. & D. 498.)

A town clerk, who was in office at the passing of stat. 5 & 6 Will. IV. c. 76(1), but who had been re-appointed afterwards, and subsequently dismissed by the council, applied for compensation, which the council refused. He then appealed to the Lords of the Treasury by memorial, and prayed therein to be heard by himself, his counsel, agents, or witnesses. The council sent in a memorial in answer, and the town clerk another in reply. The council, in their memorial, alleged that they had dismissed him for conduct which, they stated, warranted removal. This the town clerk denied. The Lords of the Treasury, without hearing the parties further than by taking the memorials into consideration, awarded that the town clerk was entitled to no compensation; stating as their reason, that they thought the council had made the removal in the *bona fide* and justifiable exercise of the discretion vested in them. On application for a *mandamus* to the Lords, commanding them to hear the appeal:

Held, that it could not be granted; for that, if the Lords had jurisdiction (and *semble*, that they had not), they had already heard and decided.

Although the Court considered that the dismissal was not warranted by the town clerk's conduct.

CRESSWELL obtained a rule, in Michaelmas Term, 1837, calling upon the Lords Commissioners of Her Majesty's Treasury to show cause why a *mandamus* should not issue, commanding them to hear and determine the merits of the appeal of James Tibbits, on

(1) Repealed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 5.—B. C.

his claim to be allowed compensation for the loss of the office of town clerk of the borough of Warwick: notice to be given to the solicitor for the Treasury, and the mayor and town clerk of the borough of Warwick.

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The affidavit of Tibbits contained the following statements. On 7th May, 1827, he was appointed town clerk (1), and he so continued until and at the passing of the Municipal Corporations Act, 5 & 6 Will. IV. c. 76 (2). *Under the provisions of that Act, he ceased to hold the office on 31st December, 1835. On 1st January, 1836, he was re-appointed town clerk by the new town council. On 6th October, 1836, he was removed by them from the office. Shortly after the Act passed, a minute was made and promulgated by the Lords of the Treasury, dated 10th September, 1835, and headed, "Compensation to Town Clerks," which referred to stat. 11 Geo. IV. & 1 Will. IV. c. 58, and concluded as follows (3):

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(1) The affidavit also contained a statement of a claim for compensation made by Tibbits in respect of the offices of clerk of the peace and clerk to the justices, as to which the Lords of the Treasury awarded a gratuity; but, as the argument and judgment related exclusively to the office of town clerk, so much only as relates to that office is stated in the text.

(2) Repealed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 5.—R. C.

(3) The minute began thus. "My Lords read the 66th clause of the Act for the reform of municipal corporations, by which compensation is provided for all corporate officers whose office shall be abolished, or who shall be removed from office under the provisions of the Act, or who shall not be re-appointed as aforesaid; and in certain cases an appeal is given to the Lords of the Treasury, who shall make such order as may appear to them just, which order shall be binding on all parties.

"Lord Melbourne and the Chancellor of the Exchequer inform the board that in the discussions which took place in Parliament on this clause, it was stated by them that in fixing the amount of compensation it would be right and equitable to take into consideration,

not only the salary and just emoluments of the office of town clerk, but also the profits derived from the performance of legal business of the several corporations executed by town clerks in their official capacity, and the just emoluments of any other corporate appointment held by such town clerk, and usually held in conjunction with, or attached or annexed to, the office of town clerk. My Lords concur in the views expressed by Lord Melbourne and the Chancellor of the Exchequer, and are pleased that their opinion should be recorded for the future guidance of the decisions on such cases as may be referred to them under the Act.

"My Lords proceed to consider the principles upon which compensation should be awarded. My Lords read the Act, 1 Will. IV. c. 58, by which the Legislature have secured compensation to officers in the courts of law upon abolition of office.

"My Lords read the fourth reason of the House of Commons for dissenting to the amendment of the Lords proposing to continue the existing town clerks for life, in which reason it is stated that a just and liberal construction cannot fail to be given to the compensation clause proposed by the House of Commons. My Lords consider," &c. (as above).

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“My Lords consider that the principle adopted by the Legislature in the fore-cited Act may fairly be applied *to the cases of the town clerks, and they are of opinion that in all cases where such officer holds his office for life, or where the usage has been such as to raise a just expectation that the office should continue for the life of the holder, a compensation of not less than two thirds of his profits may be granted to such officer, estimated upon the principles stated in the commencement of this minute, and calculated upon an average of his just emoluments for the five years previously to the 1st January, 1835.”

About 1st January, 1887, Tibbits delivered to the new town clerk and the treasurer of the borough a statement of his claim for compensation, in which he alleged that the appointment of town clerk had been always considered in the borough as an appointment for life, and gave an estimate of his annual emoluments on an average of the last five years, claiming in respect thereof 1,200*l*. On 22nd February, 1887, he received a notice from the then town clerk, stating that the council had wholly disallowed his claim, and inclosing a report of a committee appointed by them for considering it, wherein they stated “that the office of town clerk in Warwick was held during the pleasure of the Recorder; and the committee do not find that the usage has been such as to raise a just expectation that Mr. James Tibbits should hold that office during his life: they therefore, on these grounds (without referring to the various other objections to the claim), do not consider that he is entitled to claim or receive any compensation out of the borough fund by reason of his removal from that office.”

[*377] In March, 1887, he appealed to the Lords of the Treasury by a memorial, in which he stated the above *facts, and mentioned that he had been removed by the council in consequence of some disputes having arisen between the council and himself relative to the transaction of the legal business of the corporation, which had been placed in the hands of another solicitor while he continued in the office of town clerk. He then submitted, in his memorial, that he ought to have been considered as holding for life, or, at all events, under such circumstances as to raise a just expectation that he should be continued in his office for life; and he set out a clause of the governing charter (5 W. & M.), by which it was provided that the town clerk should be appointed by the Recorder, and continue in his office so long as it should please the Recorder: and

he referred to the usage of the borough, as showing a general practice of the town clerk holding for life. He added that he was willing to meet any charges of misconduct; and prayed that he might be heard before their Lordships by himself, his counsel, agents, or witnesses, in support of his claims, in case of further opposition thereto. About 14th July, 1837, he received from the Lords of the Treasury a copy of a memorial of the corporation in answer to his statement, with an intimation that it was sent to him in order that he might make any observation in reply. The memorial of the corporation stated that the usage had never been to consider the office as one for the life of the holder; and mentioned that one of Tibbits's predecessors had been dismissed from his office by a late Recorder. Other facts were added as to the usage. The corporation further contended, in their memorial, that Tibbits had forfeited all claim to compensation, by reason of improper conduct towards the corporation, the facts respecting which they then stated; *adding that they had therefore dismissed him from his office, and that they were ready to prove the truth of their statement in any manner which the Lords should think necessary. Tibbits transmitted a memorial to the Lords of the Treasury in answer, denying or explaining the allegations in the statement of the corporation, but admitting the fact of the dismissal of a previous town clerk by the Recorder; and contending that (as he was legally advised) he was entitled to be employed in the legal business of the corporation.

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About 28th December, 1837, he received a Treasury minute, dated 15th September, 1837, of which the following are extracts:

“The legal tenure of the office was during the pleasure of the Recorder, who held his office for life. Mr. Tibbits contends that, though the tenure was nominally during the pleasure of the Recorder, the usage was such as to raise a just expectation that he should hold the office for life. My Lords refer to Mr. Tibbits's own statement, in which they observe, that it is admitted by him that, in 1798, Mr. Thomas Greenway, the common clerk, was, in consequence of a dispute with the late Earl of Warwick (1), dismissed from his office. My Lords cannot admit that, with the recent instance before them, they should be justified in declaring that the immemorial usage had been such as to raise a just expectation that the office would continue for life, or during good

(1) The then Recorder,

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behaviour. They do not, therefore, judge Mr. Tibbits entitled to the benefit of their minute of 1835, but are of opinion that he should be dealt with in the same manner as if he held an office during pleasure in the public service, and retired upon abolition *or reduction of office, which course my Lords have pursued in similar cases" (1). * * *

"It remains for my Lords to decide upon the claim for the loss of the office of town clerk, to which Mr. Tibbits was elected by the town council, from which he was removed on the allegation of misconduct. The object of the Act, in giving the privilege of granting compensation in such cases, was clearly to prevent the claims for compensation being defeated under colour of a re-election and subsequent removal; but it was never the intention of the Legislature to interfere with the just authority of the town council over their town clerk, or to deprive them of the fair claims which they possess to the zealous and faithful services of their legal adviser and agent. Had my Lords any reason to suppose, from the papers before them, that Mr. Tibbits was re-elected for the object of defeating his claim for compensation, and of removing him upon any pretext or excuse which might subsequently appear, and not with the *bonâ fide* intent of continuing him in office so long as he should conduct himself to the satisfaction of the town council, my Lords would have felt themselves bound to have awarded him the same compensation as if he had been originally removed from his office. Upon an attentive consideration of the papers, my Lords can find no ground to impute such a course to the town council, or to adjudge that the removal of Mr. Tibbits was not made in the *bonâ fide* and justifiable exercise of the discretion vested in them. In this view of the case, my Lords are decidedly of opinion that Mr. Tibbits is not *entitled to compensation for his removal from the office of town clerk." Their Lordships then ordered that no such compensation should be awarded.

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Tibbits further stated, in his affidavit, that his prayer to be heard before the Lords had not been complied with, and that, as far as he was informed, their decision was made without any further investigation than as appears by the documents above mentioned. In last Hilary Term (2),

(1) It appeared from the minute that, in these cases, the Lords were in the habit of awarding a compensation as a gratuity, in proportion to

length of service.

(2) January 12th, 1839. Before Lord Denman, Ch. J., Littledale, Williams, and Coleridge, JJ.

Sir J. Campbell, Attorney-General, Sir F. Pollock, and Wightman, showed cause on behalf of the Lords of the Treasury, and Sir W. W. Follett and Waddington on behalf of the Corporation (1):

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The Lords of the Treasury have in fact heard this application, and would so return, if the *mandamus* were to go. Whether they decided correctly or not, is a question which cannot now be discussed; this Court will not hear an appeal from the decision, even upon a pure question of law: *In the Matter of Pratt* (2). In *Rex v. The Mayor, &c., of Bridgewater* (3) this Court interfered; but there they enforced a decision of the Lords of the Treasury. The Court there seemed to consider that the decision of the Lords, if without jurisdiction, might be a mere nullity, and so not to be enforced by this Court: and in *Regina v. The Corporation of Poole* (4) the Court refused to enforce their decision, conceiving the case not to be within the statute, and that the Lords, therefore, had no jurisdiction. Here, the assumption on the other side is that they have jurisdiction; otherwise the *mandamus* could not go. Besides, under the circumstances, the compensation could be merely nominal: the Court therefore will not grant the writ: *Ex parte Lee* (5).

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Cresswell and G. Hayes, contra:

It is certainly true that this Court will not enforce an order of the Lords of the Treasury where the statute gives no jurisdiction, because the Lords cannot give themselves jurisdiction. It seems to follow that they cannot divest themselves of jurisdiction: and therefore this Court, when the Lords refuse to hear a case within the statute, will compel the hearing: *Rex v. The Justices of Kent* (6), *Rex v. The Justices of the City of York* (7), show the power exercised by this Court in such cases. In this case there has been no hearing. It is not necessary to contend that the applicant had a right to appear by counsel or agent: but, after the respective statements were before the Lords of the Treasury, the parties should have been heard; and a decision given without such hearing is a nullity. Mr. Tibbits applied, in his first memorial, to be heard by himself,

(1) *Cresswell* objected to counsel being heard on behalf of the Corporation, although the rule directed notice to be given to them; but Lord DENMAN, Ch. J. said that, according to the practice in such a case, the Corporation were entitled to be heard.

(2) 7 Ad. & El. 27.

(3) 45 R. R. 476 (6 Ad. & El. 339).

(4) 7 Ad. & El. 730.

(5) 7 Ad. & El. 139.

(6) 14 East, 395.

(7) 40 R. R. 449 (1 Ad. & El. 828).

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or his counsel, or agent. This was the more necessary, because from *Ex parte Lee* (1) it appears that the Lords of the Treasury are not aware that an office held during good behaviour is an office for life. Here they appear to assume that a *bonâ fide* removal is sufficient to destroy a claim for compensation; but the Legislature meant to provide, not merely against removals *malâ fide*, but against removals, generally, which might be made under circumstances not justifying dismissal from an office held during good behaviour. Such removal, though made *bonâ fide*, may be unjustifiable. The proviso in sect. 66 of stat. 5 & 6 Will. IV. c. 76, is, "That every such officer who shall be continued in or re-appointed to such office under the provisions of this Act, and who shall be subsequently removed from such office for any cause other than such misconduct as would warrant removal from any office held during good behaviour, shall be entitled to compensation in like manner as if he had been forthwith removed under the provisions of this Act, and had not been continued in or re-appointed to such office." This refusal appears, by the statement of the Lords of the Treasury, to have proceeded on a wrong principle.

Cur. adv. vult.

LORD DENMAN, Ch. J., in the present Term (June 3rd), delivered the judgment of the COURT :

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This was an application for a *mandamus* to hear and decide the appeal of the late town clerk of the borough of Warwick against the refusal of the council to allow him any compensation for the loss of his office. It arises under the sixty-sixth section of the Municipal Reform Act, which requires the town council to make compensation to all whose offices may be abolished, or who may be removed from them under the provisions of that Act, with a proviso, that every such officer who shall be so removed for any cause, other than such misconduct as would warrant removal from any office held during good behaviour, shall be entitled to compensation in like manner as if he had been removed **forthwith* under the provisions of that Act, and had not been continued in or re-appointed to his office.

The facts of the present case are these : that the town clerk was continued in his office for some time after the Act passed ; but the Corporation, being involved in some proceedings in Chancery respecting the management of a charity, were dissatisfied with his

conduct in some particulars connected with it. He had refused to part with some documents, placed by the terms of the trust under his care, for the purpose of being carried to the solicitor in London; and had insisted on keeping the key of the chest in which they were lodged. These circumstances produced some degree of inconvenience, and some angry feelings; and he was removed from his office by a vote of the council, who refused him all compensation. On his appealing to the Treasury, their Lordships were of opinion that the removal was justifiable, and confirmed the order of the council, observing to the effect that, though officers were not to be removed without reasonable cause, yet in this case they thought the council had just ground for dissatisfaction in the town clerk's conduct, and were therefore not bound to make compensation to him on his removal.

In the Treasury minute issued on the present occasion, their Lordships very candidly disclose the reasons for their decision, observing that the proviso was meant to protect the officers from fraudulent amotion, but that the town council of Warwick could not be charged with any improper motive, as the dissatisfaction appears to their Lordships to be genuine and well founded. But, in answer to this, it must be said that the protection against fraudulent amotion is specific, and is referred to *a precise test,—whether the amotion would have been warranted by the officer's misconduct.

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The town clerk urges that he has been guilty of no such misconduct. We think him in this clearly right; and the contrary proposition was not contended for at the Bar. But the cause shown against the rule was, that the proceeding asked for was already complete, as the Lords of the Treasury had heard and decided the complaint; which is certainly true: so that, if they have jurisdiction over the subject-matter, as the application for the rule supposes, they have actually pronounced a judgment which cannot be questioned.

The Court, however, conceived a strong doubt whether this jurisdiction is entrusted by the Act to the Lords of the Treasury. An appeal to them is indeed given from the decision of the town council; but the proviso comes after, giving full compensation to such as may be removed without such misconduct as would warrant dismissal, not such as their Lordships may think would have warranted dismissal. No power is conferred by the Act on the Lords of the Treasury, for ascertaining the facts which may be thought to prove such misconduct; nor is there any disrespect to their Lordships in supposing that they may not be cognisant of the law (often difficult of application) on which the question might turn.

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These considerations appear to prove that the Lords of the Treasury have no power to decide the question whether the town clerk has or has not been properly removed from his office. If they have it not, the *mandamus* prayed for cannot issue, for that reason. If they possess the jurisdiction, the answer, that they have *already exercised it, is equally conclusive against making the rule absolute.

Whether there may be another remedy it is no part of our duty to decide at present.

Rule discharged (1).

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Feb. 4.

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REG. v. THE CORPORATION OF WARWICK.
REG. v. THE MAYOR, ALDERMEN, AND BURGESSES
OF THE BOROUGH OF NEWBURY.

(10 Adol. & Ellis, 386—398 ; S. C. 3 P. & D. 429.)

Where a party removed from a borough office under stat. 5 & 6 Will. IV. c. 76(2), re-appointed, and afterwards dismissed, applies to the town council for compensation, which is refused, and he thereupon appeals to the Lords of the Treasury under sect. 66 of the statute, the Lords have no jurisdiction to enquire whether he was or was not removed for a sufficient cause within that section.

And therefore, where the council had refused compensation, and the Lords, on appeal under sect. 66, and on enquiry into the facts leading to the dismissal, confirmed such refusal, this Court, on affidavits satisfactory to them, granted a *mandamus* calling on the corporation to assess compensation, notwithstanding the judgment of the Lords.

AFTER the above decision in *Reg. v. The Lords of the Treasury*, a rule was obtained on behalf of Mr. Tibbits, in the

(1) REG. v. THE LORDS COMMISSIONERS OF HER MAJESTY'S TREASURY.

Ex parte Smyth, 42 R. R. 509 (3 Ad. & El. 719), *Kent v. Elstob*, 6 R. R. 520 (3 East, 18).

Cur. adr. vult.

IN THE MATTER OF TREVOR.

A RULE for a similar *mandamus* had been obtained in Michaelmas Term, 1837, by *Sir W. W. Follett*, on behalf of John Trevor, late town clerk of Bridgewater. In last Easter Term (April 16th, before Lord Denman, Ch. J., Littledale, Patteson, and Coleridge, JJ.), *Sir John Campbell*, Attorney-General, *Sir F. Pollock*, and *Wightman* showed cause, and *Jervis* and *Jardine* supported the rule. The following cases were referred to: *Harcourt v. Fox* (4 Mod. 167), *Rex v. Owen* (4 Mod. 293), *Bagy's case* (11 Co. Rep. 93 b), *Rex v. The Mayor and Aldermen of London* (3 B. & Ad. 255),

LORD DENMAN, Ch. J., after delivering the judgment in the text, added :

In another case, moved on the part of the town clerk of Bridgewater, the same judgment must be given; the only difference in the two cases lying in the particulars of conduct which have been thought to justify his dismissal, but, in our opinion, certainly do not, within the terms and meaning of the proviso.

Rule discharged.

(2) Repealed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 5.—R. C.

same (Trinity) Term, for a *mandamus* to the corporation to assess compensation to him for the loss of his office of town clerk. The affidavit in support of this rule set forth the same grounds of application as those urged in support of the former motion ; alleged reasons for which Mr. Tibbits believed that he should have held his office till death or resignation, but for the passing of stat. 5 & 6 Will. IV. c. 76 ; and mentioned the prior application against the Lords of the Treasury, and its unsuccessful result, stating, as the ground of rejection, “ that this deponent was not legally entitled to any compensation under the said statute.” The affidavits in answer went into the merits of the case as to the grounds of dismissal, and the alleged tenure of office, and stated that the Lords, on a full statement of facts, had decided against Mr. Tibbits as to the tenure and reasonable expectation of continuance in the office.

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In the case of *Reg v. The Mayor, &c., of the Borough of Newbury*, a rule had been obtained, on behalf *of Robert Baker (in Trinity Term, 1839), for a *mandamus* commanding the mayor, &c., to prepare, execute, and deliver to him a bond, securing to him an annuity of 107*l.*, in compensation for the loss of his office of town clerk of the said borough. He stated in his affidavit that he was town clerk when stat. 5 & 6 Will. IV. c. 76, passed, was re-appointed in August, 1836, and was dismissed, by resolution of the town council, in January, 1838. He denied that such dismissal was merited, or that he had been guilty of such misconduct as would warrant his removal from the said office or any office held during good behaviour ; and he stated his belief (alleging circumstances as to the tenure in former times) that, but for the passing of the Act, he would have continued to hold the office during life. He then deposed that, in March, 1838, he laid before the town council a claim of compensation, which they disallowed ; whereupon he presented a memorial of appeal to the Lords of the Treasury, setting forth the material circumstances of the case. The Lords transmitted the memorial to the mayor, to be laid before the town council for any observation upon or answer to it which they might think fit to submit ; and the town council presented a reply to the memorial, in which they stated at length the reasons for their determination on Mr. Baker’s claim, and contended that he was not entitled to compensation under the sixty-sixth section of the Act. The Lords transmitted this statement to Mr. Baker for any observations which he might think fit to make ; and he presented

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a memorial in answer. The Lords, by minute of January 23rd, 1839, made (as was therein stated) after having "read all the papers in the appeal," and "upon a full consideration of all the *papers," pronounced Mr. Baker entitled to compensation; awarded him an annuity of 107*l.* for life; and directed that an order should be prepared, and sent, with that minute, to the mayor. The affidavit stated that this was done, but no step taken by the town council for granting the annuity.

The affidavits in answer controverted Mr. Baker's statements as to the tenure of the office, and alleged further that he had been dismissed (after due examination and hearing) for misconduct, which they shortly specified, and which, in the opinion of the town council, would warrant removal from any office held during good behaviour: and that the facts in these affidavits above mentioned, and all the material circumstances of the dismissal, were stated by the town council to the Lords of the Treasury, in answer to Mr. Baker's memorial, and while the same was under their consideration. The affidavits then set forth more fully the circumstances of the alleged misconduct, and of Mr. Baker's dismissal, and averred that the town council delivered to the Lords a statement under their common seal, alleging the principal facts above set forth, and examining the details of Mr. Baker's claim for compensation; but such examination was declared to be without prejudice to the position that his conduct warranted his removal without compensation. The deponents also stated that they were advised and believed that the misconduct stated by them warranted removal from any office held during good behaviour.

This case coming on for argument before that of *Reg. v. The Corporation of Warwick*, and raising the same point as to the jurisdiction of the Lords of the Treasury, the Court desired to hear the latter case also *before giving any judgment; and they were argued in immediate succession (1).

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Sir W. W. Follett and J. L. Adolphus against the rule in
Reg. v. The Mayor, &c., of Newbury:

The adjudication of the Lords of the Treasury is ineffectual for want of jurisdiction. By stat. 5 & 6 Will. IV. c. 76, s. 66, every officer of a borough "who shall be in any office of profit at the

(1) January 29th and 30th. Before Lord Denman, Ch. J., Littledale, Williams, and Coleridge, JJ.

time of the passing of this Act, whose office shall be abolished, or who shall be removed" under the Act, or shall not be re-appointed, and every such officer re-appointed under this Act who shall be subsequently removed "for any cause other than such misconduct as would warrant removal from any office held during good behaviour," is declared entitled to compensation, which is to be assessed by the council and paid out of the borough fund. The same section enacts that every person "entitled to such compensation" shall deliver a statement as to his past emoluments, &c., and setting forth the sum claimed by him, which statement shall be taken into consideration and determined upon by the council; and, if the claimant "shall think himself aggrieved by the determination of the council thereon, or in case one third of the members of the council shall subscribe a protest against the amount of compensation allowed by the determination of the council as excessive," the claimant, or any member of the council so subscribing, may appeal to the Lords of the Treasury, "who shall thereupon make such order as to them shall seem just;" and such order, signed, &c., "shall be binding on all parties." By this clause it is an essential preliminary to the claim, that *the party shall have held office under the circumstances pointed out by the Act, and have been removed (or not re-appointed), under the Act; or that, if re-appointed, he shall have been removed for such cause as the section defines. These are facts necessary to give the claimant a *locus standi* before the council. If they are unquestioned, and the council adjudicate upon the claim, but make an unsatisfactory award as to the amount, an appeal clearly lies to the Lords of the Treasury. But, if these preliminary facts, or the legal inference from them, as he suggests it, be denied, and the council for that reason refuse to award any compensation, the claimant ought not to appeal to the Lords of the Treasury, nor can they enquire into the matter in dispute. He must move this Court for a *mandamus* to the council to hear his claim and award compensation; if they still contest the facts upon which he grounds his right of claim, the Court, if it sees cause, will grant the writ, and, on a return, the facts may be tried in due course of law. Then, if a peremptory *mandamus* issue, the council must determine the amount of compensation; and upon that point the claimant, if dissatisfied, may appeal to the Lords of the Treasury. But, if, when the council refuse to entertain his claim, he appeals, in the first instance, to the Lords upon the disputed question of fact or law, he submits

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matter to them which they have no power to try. The Lord Treasurer, whom they represent, had no such judicial authority : 4 Inst. c. 11 ; and they can have none but that which the statute gives them. The statute furnishes them with no means of enquiring into disputed facts ; they cannot administer an oath, or compel the attendance of witnesses : and on points of law they have no legal assessor ; nor is there any court of appeal to rectify their judgments if they *mistake the law : yet, if they could determine the preliminary questions which arise as to the right of making a claim, they would often have to decide very important questions both of law and of fact. The statute, in reality, makes them mere valuers. When the party " entitled to such compensation " has had his statement received and considered by the council, the Lords of the Treasury are, in case of appeal, made arbitrators upon the question of amount. Their mode of trying, by memorials and counter-memorials, is suited to this kind of investigation, but not to enquiries of a more difficult kind, as on questions of misconduct. The appeal is given in case the claimant thinks himself aggrieved by the determination, or if one third of the council protest against the amount of compensation as excessive. There is no reason that the enquiry should be limited to amount in the one case more than in the other ; the wording of this clause is an additional proof that the same limit was contemplated in both instances. It may be contended that the council are, by sect. 66, to assess compensation with " regard " to " all " the " circumstances of the case," and that the Lords must assess upon the same principle ; but the " circumstances," on the enquiry before them, can only be those bearing on the question of amount. Here the Lords have made their award upon statements raising the whole question of misfeasance in office : their adjudication, therefore, is grounded on an excess of jurisdiction.

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In the late case of *Regina v. The Lords of the Treasury, In the Matter of Tibbits* (1), this Court expressed at least a doubt as to the jurisdiction of the Lords to decide whether or not a town clerk had been properly removed. In *Rex v. The Mayor, &c., of Bridgewater* (2), where the *Lords, on appeal, had awarded compensation, as for a corporation office, Lord DENMAN, Ch. J. and COLERIDGE, J., intimated that, if it had appeared not to be a borough office, the Court would not have enforced the decision, and that the Lords could not, by their own order, give themselves jurisdiction. If

(1) *Ante*, p. 446.

(2) 6 Ad. & El. 339.

they had jurisdiction, their order, by sect. 66, was “binding on all parties.” In *Regina v. The Corporation of Poole* (1) the Lords had, on appeal, awarded compensation for dismissal from an office: but this Court held that the party was not dismissed by virtue of the Municipal Corporation Act, and therefore refused to enforce the award by *mandamus*: and Lord DENMAN, Ch. J. said, “We were desirous of considering whether, upon the affidavits, he was an officer of the borough of Poole, and had been removed from his office under the provisions of the Act. If we should be satisfied that the affirmative of both these propositions was established, we had no doubt that the Lords of the Treasury had the exclusive jurisdiction to determine on his right to compensation; and it would then be our duty to enforce by *mandamus* obedience to the award they have made; but, if either of those propositions be decided in the negative, it would be equally clear that their Lordships have not, and of course cannot give themselves, jurisdiction.” It is unnecessary here to discuss the facts; for it is sufficient that the council have dismissed Mr. Baker’s claim on account of an objection to his right of appearing as a claimant; namely, that he was removed from office on a *bonâ fide* charge of misconduct. Had the charge been made colourably, to preclude the claim, a different question would have arisen; but that is not pretended.

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Sir J. Campbell, Attorney-General, and *Whateley*, in support of the rule; and *Sir J. Campbell*, Attorney-General, and *Waddington*, in opposition to the rule in *Reg. v. The Corporation of Warwick*:

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If the Lords of the Treasury had not jurisdiction, their award, of course, cannot stand. But it is clear that they have jurisdiction over the claim of an officer dismissed and not re-appointed; and there is no distinction between that and the claim of a person re-appointed and dismissed without proper cause. It is contended on the other side that, on appeal, the Act makes them merely valuers; but sect. 66 directs that the town council, in assessing compensation to an officer not re-appointed, is to consider “the manner of his appointment to the said office, and his term or interest therein, and all other circumstances of the case;” and, when the claimant appeals, the whole matter, as it came before the council, is, by sect. 66, referred to the Lords of the Treasury. Where members of the council protest, the Lords are expressly

(1) 7 Ad. & El. 730.

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limited in their enquiry to the question of amount ; but, where the claimant appeals, there is no such restriction : the council are first to decide upon the right of claim and the *quantum* ; and, “ in case the person preferring such claim shall think himself aggrieved by the determination of the council thereon,” he may appeal to the Lords of the Treasury, “ who shall thereupon make such order as to them shall seem just.” It is contended that the Lords of the Treasury cannot decide a disputed question on the right, because they have no authority to administer an oath : but they can decide upon the evidence taken before the council. Here the town council of Newbury submitted themselves to the judgment of the Lords upon the evidence. If, indeed, the *supposed office for which the Lords grant compensation prove not to be an office within the Act, their award must necessarily be a nullity ; and that was the case in *Regina v. The Corporation of Poole* (1) : but no such point arises here. In *Ex parte Lee* (2) it was made a question whether the Lords had jurisdiction where the council had entirely refused to grant compensation under all the circumstances of the case ; and this Court did not deny that they had such jurisdiction. But in such a case, if the Lords could decide at all, the whole matter must go before them. This Court will not enter into questions of nicety on the jurisdiction of the Lords Commissioners in cases of compensation. They are appointed by the statute as a temporary tribunal to administer a rough justice (under the control of this Court) in a particular class of cases, the Legislature placing this confidence in them with a view that they should act liberally, and take care that persons really aggrieved should obtain the compensation due to them.

Cresswell and G. Hayes in support of the rule in *Reg. v. The Corporation of Warwick* :

Ex parte Lee (2), if it decided any thing applicable to the present case, would show that the town council cannot absolutely refuse compensation, nor the Lords of the Treasury confirm such refusal on appeal. *Regina v. The Corporation of Poole* (1) is, in principle, decisive of this case. If the Lords of the Treasury there could not decide conclusively that the claimant was removed from his office under circumstances entitling him to compensation within the statute, neither can they conclusively decide *that point here. This Court is, by virtue of its ordinary jurisdiction, the proper

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(1) 7 Ad. & El. 730.

(2) 7 Ad. & El. 139.

tribunal for determining the party's right to be a claimant; and that jurisdiction could be taken away only by express statutory enactment. It is argued that, although the Lords cannot examine witnesses, they may act upon the evidence taken by the town council; but, where an individual is the appellant, he might justly complain that this was trying the case on evidence taken by the adverse party. And the council have no power, by sect. 66, to examine any one on oath but the claimant himself.

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LORD DENMAN, Ch. J. now delivered the judgment of the COURT in
Reg. v. The Corporation of Warwick :

The late town clerk, having been removed from his office, appealed to the Lords of the Treasury, complaining that the removal was not justified by such misconduct as would have warranted his removal from an office held during good behaviour. Their Lordships, having considered the statements of both parties, dismissed the appeal, thinking that the council had acted *bonâ fide*, and that they had just ground for removing the officer. The supposed misconduct was laid before us by affidavit, and appeared to us then, as it does now, not to be such as would have warranted removal from an office held during good behaviour. If, however, the Lords of the Treasury had jurisdiction to try that question, all the world is bound by their decision, though we may deem it erroneous. But a *mandamus* to them to hear and decide was refused, because they either had no jurisdiction or had already exercised it. The same gentleman has now obtained a rule for a *mandamus* to *the council to assess compensation for the loss of his office, on the ground that his removal was unwarrantable under the proviso above alluded to. The cause now shown against that rule is the before-mentioned decision of the Lords of the Treasury on his appeal, and brings directly before us the question of their jurisdiction in this matter.

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The effective words of the sixty-sixth clause are, that every officer of a borough who shall be in any office of profit at the time of the passing of this Act, who shall be removed from his office under the provisions of this Act, shall be entitled to have an adequate compensation, to be assessed by the council, for the salary, fees, and emoluments of the office, regard being had to the manner of his appointment, and his term or interest in the office, and all other circumstances of the case: the person entitled

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shall deliver in a statement of the amount received by him for the last five years, and the council shall consider and determine thereon; and, if he think himself aggrieved by their determination, it shall be lawful for him to appeal to the Lords of the Treasury, who shall thereupon make such order as to them shall seem just, which shall be conclusive and binding: Provided (among other things) that every such officer who shall be continued in office and subsequently removed "for any cause other than such misconduct as would warrant removal from any office held during good behaviour, shall be entitled to compensation in like manner as if he had been forthwith removed under the provisions of this Act," and not continued or re-appointed.

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If, now, this town clerk had been forthwith removed, he would have been entitled to an adequate compensation for the emoluments of his office, regard being had *to the nature of his appointment, his term in the office, and all other circumstances of the case, with a power of appealing, if dissatisfied with the determination of the council, to the Lords of the Treasury.

Must they, the Lords, then, have the right to consider the causes of removal, and decide on their sufficiency? If so, it must be from being empowered to look at them as circumstances of the case: but the circumstances are only referred to them as qualifying the amount of compensation, while, if the removal were justifiable, no compensation could be due. Or must not the facts be such as to show that the removal was not for misconduct, to ground their jurisdiction? We think the latter. The words of the proviso control the whole clause: if the council removed without a case of misconduct, they must give compensation. Whether that misconduct existed, must be determined by some superior authority. But, if that authority was the Treasury, it is incredible that no power is given to their Lordships to inquire into the facts; nor can they be expected to possess the legal knowledge requisite for deciding what misconduct would have justified the officer's removal. On the contrary, all the words of the section are employed in creating a power to revise the assessment of the compensation, in like manner as if the party had been removed by the Municipal Reform Act, or immediately after its passing.

We think the town council could not deprive their officer of his right to compensation by removing him without cause; that the Lords of the Treasury had no authority to exclude him from compensation by their affirmance of what was done; and that he

is entitled in the same manner as he would have been if removed by the Act itself.

The rule for a *mandamus* must, therefore, be absolute; or, if the council think their dismissal justified by the misconduct of the town clerk, that must be returned as an answer to the writ.

Rule absolute.

In *Reg. v. The Mayor, &c. of Newbury*, the Court, in Easter Term (May 2nd), 1840, desired to have the facts returned, and made the rule absolute.

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(10 Adol. & Ellis, 398—411; S. C. 2 P. & D. 357.)

A land-owner may be liable, by prescription, to repair sea-walls, though destroyed by extraordinary tempest. And therefore, on presentment against such owner, for suffering the walls to be out of repair, it ought not, in point of law, to be left as the sole question for the jury, whether the walls were in a condition to resist ordinary weather and tides: but it is a question, to be determined on the evidence, whether the proprietor was bound to provide against the effects of ordinary tempests only, or of extraordinary ones also.

Orders of the commissioners of sewers, requiring landowners to repair and alter sea walls, may be given in evidence as adjudications by a court of competent jurisdiction, without proof of their having been acted upon. After a considerable lapse of time (as seventy years), the Court will presume that such orders were executed.

PRESENTMENT at a general court and sessions of sewers for the Levels of the hundreds of Caldicot and Wentlooge, in Monmouthshire. The presentment charged that the defendants, and all those whose estates they have of and in certain lands and tenements commonly called the Lordship of Porton, situate within the parish of Goldcliff, in the county of Monmouth, within the level of the hundred of Caldicot, and within the jurisdiction of this Court (part of which said lands abut in part upon part of the wall hereinafter mentioned), from time whereof, &c., by reason of their tenure of the said lands &c., have been forced to repair, and of right ought to have repaired, and still of right ought, &c., divers parts of a certain wall called Porton Wall, adjoining to a certain public navigable river called the Severn, *and within the said parish, &c., and

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(1) See *Reg. v. Commissioners of Sewers for Essex* (C. A. 1884 and H. L. 1886), 14 Q. B. Div. 561, 576, 11 App. Cas. 449, 472, 54 L. J. M. C. 89, 92, 56 L. J. M. C. 1, 3, 6.—R. C.

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within the level and jurisdiction aforesaid, that is to say a certain part of the said wall, &c. (stating the extent and local situation of the portions of wall), which said several parts of the said wall are within the parish, &c., and within the level and jurisdiction aforesaid. Averment that, although defendants ought to have repaired and kept in repair the said several parts, they have wholly neglected so to do, and that, by and through the neglect and default of defendants in this behalf, and for want of the said several parts of the said wall being kept in due and sufficient repair, heretofore, to wit on, &c., divers large portions of the said wall, viz. (stating the length of the portions respectively), were ruinous, prostrate, &c., and yet remain and continue ruinous, prostrate, &c., down to the time of taking and finding this inquisition. And that defendants, by reason of their tenure of the said lands and premises, ought to repair, amend, and make good the said several breaches, defects, and injuries in the said several parts of the said wall. And the jurors further presented that the costs of repairing the said breaches, &c., would amount to 767*l*. The presentment was removed by *certiorari* into this Court, where the defendants pleaded Not guilty.

On the trial of the issue, before Bolland, B., at the Monmouthshire Spring Assizes, 1837, it appeared that the defendants were liable to repair *ratione tenuræ*, and that the wall had been thrown down by the sea on October 11th, 1836. The defendants insisted that in this instance they were not liable, inasmuch as the mischief had been done by an extraordinary tempest, which fact was proved. It appeared that the wall in question had been repaired by the lords of the land now charged, in *1813 and 1815, after storms: the last time at an expense of more than 5,000*l*. Some evidence was given as to the condition of the wall before the repairs done in 1813 and 1815 became necessary. There was no proof that before those times it had been presented as wanting repair.

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The counsel for the Crown also tendered in evidence certain documents alleged to be presentments by sewers' juries touching defects and liabilities to repair within the levels in question; and minutes of orders purporting to be made by the commissioners of sewers within these levels at various periods during the last hundred years (among others, an order of 1761), for the repair or alteration of walls by parties mentioned in the minutes as liable. The presentments and orders were contained in books, produced by the clerk of the commissioners, who held them in that capacity.

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BOLLAND, B. held the presentments inadmissible. As to the orders, he enquired if they had ever been acted upon. *Maule*, for the Crown, said that, in the case of old orders, that could not have been shown, but that the orders themselves were acts; and that it lay on those who disputed their admissibility to show that they had been disobeyed. BOLLAND, B. held that the orders, not appearing to have been acted upon, or even to have come to the knowledge of the parties supposed to be affected by them, could not be read.

The learned Judge, in summing up, told the jury that the only question was, whether or not the wall, which the defendants were charged as liable to repair, was, at the time of the storm on October 11th, 1836, in such a state as to have resisted the ordinary pressure of the weather and tides upon the spot on which it was constructed; and he said that, if the prostration of the *wall was attributable to the storm, and not to any infirmity in the wall itself upon which the defendants would be liable, it would of course be the duty of the jury to acquit. His Lordship read to them the argument of *Gibbs* and *Dampier* in *Rex v. The Commissioners of Sewers for the Western Division of Somerset* (1), which he said was recognised as law by Lord KENYON in the same case; and the judgment of ABBOTT, Ch. J. in *Rex v. The Commissioners of Sewers for Essex* (2). And he again stated the only question to be, whether the wall fell by reason of any infirmity in it which the defendants were liable for as being an act of their own and an act of nuisance, or by reason of the extraordinary tempest on October 11th. The jury found the defendants Not guilty.

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Maule, in the ensuing Term, moved for a rule to show cause why the verdict should not be set aside, and a new trial had, on the following grounds:

First, the learned Judge was wrong in leaving it to the jury to say whether the wall at the time of the storm was fit to withstand ordinary bad weather, and intimating to them that a party liable by tenure is not bound to repair in case of extraordinary tempest. Obligation by tenure is in this respect like obligation by covenant. The doctrine sanctioned by the learned Judge derives some colour from the language of WALMESLEY, J. in *Rooke's* case (3); but in *Keighley's* case (4) WALMESLEY, J. "explained his opinion in *Rooke's* case (3), that the commissioners ought not to charge him who is

(1) 4 R. R. 659 (8 T. R. 312).

(2) 25 R. R. 467 (1 B. & C. 477).

(3) 5 Co. Rep. 99 b.

(4) 10 Co. Rep. 139 a.

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bound by prescription only: that he meant where there is no *default in him (for that agrees with the words of the said Act of 23 Hen. VIII.), and no inevitable necessity for insufficiency or otherwise; but if he himself can do it, there he himself shall be only charged by force of the said commission: and he said, that his reason given in *Rooke's* case (1) implied as much, *sc.* for otherwise it may be that all the country will be drowned; which reason imports his meaning, that all who had lands in danger should not be charged, but in case of insufficiency of him who is bound, or for other inevitable necessity." And Callis, in his Reading on The Statute of Sewers, p. 144, thus comments on the cases. "In *Rooke's* case (1) it is said, 'that if one be bound in respect of his lands to repair a wall or bank by tenure, prescription, or otherwise, that yet the commissioners of sewers could not assess the said party alone to repair the same, and said that the commissioners were not tied to the rules of prescription, tenure, custom or otherwise, but ought to assess all the level to do the same, which are to have good thereby: ' but this being mistaken, is very justly and discreetly altered in the said case of *Keighley* (2) by the author himself; for how could it be presumed that the learned makers of this worthy law would have stricken down at one blow so many thousand prescriptions, customs, tenures, covenants, and uses, as be within this realm, which be tied and bound to do and make the repairs in this kind, some in consideration of houses and land, others for yearly rents, and for other causes." And at p. 146, he cites a case from Dyer (3), "where one made a lease for years of grounds to J. S. lying near the river Exe, *and the lessee covenanted to sustain and repair the banks of the river to preserve the meadow from surrounder on pain of 10*l.*; yet after an extraordinary flood, the banks were broken down, and the meadows were surrounded, and it was there holden to be no breach of covenant." In the edition of 1685 there is added this note (which subsequent editions retain): "And that he should be excused from the penalty: " with, indeed, a qualification,—“but yet he must make and repair the banks in convenient time." In *Rex v. The Commissioners of Sewers for Somerset* (4), where the sea-wall had been thrown down by a violent storm, the commissioners made an order, charging all persons who held lands liable to damage by inundations of the sea for want of a sufficient wall, though certain individuals had been liable to repair

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(1) 5 Co. Rep. 99 b.

(2) 10 Co. Rep. 139 a.

(3) *Anonymous*, Dyer, 33 a, pl. 10.

(4) 9 East, 109.

the former wall *ratione tenuræ* ; and it may be said that the validity of the order, as to the persons charged, was not disputed. But there the order was for building “a new wall of larger size and dimensions, and upon a different principle.” The thing to be done, therefore, was not that which the individuals were bound by prescription to do. In *Rex v. The Commissioners of Sewers for the Western Division of Somerset* (1) it was argued and admitted that, if sea-walls be destroyed by an extraordinary tide, or by tempest, without any default in the party bound to repair them, the expense of repair must fall upon the level. But the point decided was that, in such a case, a rate necessarily imposed upon the level to prevent the overflow of the sea was not bad. And there it had become “absolutely necessary to raise new works of a different and more expensive construction.”

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(PATTESON, J. : According to your *view, there could be no case in which there was not default in the party liable, if the wall were prostrate.)

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If it was destroyed by an extraordinary tempest, he would, nevertheless, be bound to repair ; but, on a presentment against him, he might show, upon the plea of not guilty, that before the accident he had kept up a wall of the proper dimensions, and that he had taken steps for repairing it as soon as possible afterwards. There is no authority showing that, where a party is liable without qualification to repair *ratione tenuræ*, he can be excused on the ground here suggested.

(LORD DENMAN, Ch. J. mentioned *Rex v. The Commissioners of Sewers for Essex* (2).)

Secondly, the orders of the Court of Sewers calling on the lords of Porton, the defendants' predecessors, to repair (and no orders on any one else were tendered in evidence) ought not to have been rejected. It was urged that they were not admissible, because nothing appeared to have been done upon them ; but, if they were obeyed, no evidence of that fact would appear, though, if they had been disobeyed, there might have been evidence of that. The order itself is a thing done by a court of competent authority ; and the presumption is that it was obeyed. Thirdly, the presentments ought to have been received, notwithstanding the objections,

(1) 4 R. R. 659 (8 T. R. 312).

(2) 25 R. R. 467 (1 B. & C. 477).

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which were, that they appeared to be copies; that nothing appeared to have been done upon them; and that they were made by a standing jury, as to which *Rex v. The Commissioners of Sewers for Somerset* (1) was cited. (The argument on this head of objection is not followed up, no decision having been given upon the points. *Maule* cited *Ex parte Taylor* (2)).

Cur. adv. vult.

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A rule *nisi* was granted (April 25th), against which

Ludlow, Serjt. and *R. V. Richards* showed cause in last Easter Term (3).

As to the liability to repair, it is contended, on the other side, that, where a sea-wall is overthrown by extraordinary tempest, the commissioners of sewers may tax the level for the purpose of more expeditious repair, but the individual bound *ratione tenuræ* will be ultimately liable. That, however, is not so where the individual has been in no default. All the cases are explained by the words of the commission of sewers, stat. 23 Hen. VIII. c. 5, sects. 2, &c., which, after reciting the mischiefs happening by the destruction of sea-walls, directs the commissioners to survey, &c., and as well to ordain and do according to the statutes, as also to inquire "through whose default the said hurts and damages have happened." The question here was, whether the wall, just before the storm, was in such a state as placed the defendants out of default; and the learned Judge left it properly to the jury to say whether the wall was in sufficient repair on the 11th of October to resist ordinary weather and tides, and whether the damage happened by any default on his part. *Callis*, pp. 146, 147, the *Anonymous* case in *Moore* (4), and *Griffin's* case (5), referred to in the note (ed. 1685) to *Callis*, p. 146, are strong authorities to show that, if the damage happens by violent tempest, without default in the party bound by prescription, he is excused. The language of *WALMESLEY, J.* in *Keighley's* case (6) also supports the proposition that, where there is no default in the individual, the public, and not he, is liable. In *Rex v. The Commissioners of Sewers for the Western Division of Somerset* (7) that doctrine was enforced in the argument against the rule, and adopted by Lord KENYON. In

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(1) 7 East, 71.

(2) 3 Y. & J. 91.

(3) April 30th. Before Lord Denman, Ch. J., Littledale, Patteson, and Coleridge, JJ.

(4) *Moore*, 62, pl. 173.

(5) *Dalison*, 70. *S. C. Moore*, 69, pl. 187, as *Griffith's* case.

(6) 10 Co. Rep. 139 a.

(7) 4 R. R. 659 (8 T. R. 312).

Rex v. The Commissioners of Sewers for Essex (1), ABBOTT, Ch. J. says, "Even where an individual is bound by prescription or otherwise to repair, still if there be no default on his part, and damage is sustained by an extraordinary flood or tempest, the whole level must bear the loss and be contributory to the repairs." It is represented on the other side that, although the commissioners are bound, in such a case, to provide for the repair in the first instance, the individual is ultimately liable; but this is not borne out by the cases, or by the language of Callis in the passages which have been referred to. In *Rex v. Baker* (2), on the Oxford circuit, where an individual was charged with repairs, the whole question turned on the condition of the wall at the time when the damage by tempest happened. The direction to the jury, therefore, in the present case was right. The former orders of the commissioners of sewers were properly rejected, for the reasons which prevailed at the trial. But, further, the proceeding here is criminal, and therefore the Court will not order a new trial. This point was much discussed, and the Court would not decide on granting a new trial, in *Rex v. Sutton* (3).

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(LORD DENMAN, Ch. J.: We can hardly consider this as a criminal proceeding.)

The defendant may suffer fine and imprisonment.

(LORD DENMAN, Ch. J.: In a civil case he may be taken in execution.)

Talfourd, Serjt. and Whateley, contra :

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The direction of the learned Judge led the jury to conclude that an individual could be liable to repair only in the case of an ordinary tempest. If there could be a larger liability, the Judge should have brought it within the jury's consideration. A larger may exist in point of law. The commissioners of sewers are to enquire by whose default damages happen; but the question is, also, by what default? Here some evidence of the more extensive obligation appeared; namely, the repairs done in 1813 and 1815.

(COLERIDGE, J.: The wall may not have been in perfect repair before those periods (4).)

(1) 25 R. R. 467 (1 B. & C. 477). Bing. 113.

(2) Not reported. See the case at (3) 39 R. R. 388 (5 B. & Ad. 52).

Gloucester, referred to by BEST, Ch. J. (4) See *Anonymous*, Moore, 62, in *Henly v. The Mayor of Lyme*, 5 pl. 173.

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It had not been presented as out of repair; the evidence showed that it was not so in 1815, before the accident; and the repair then performed cost a sum which no person would lay out unless convinced that he was liable. *Keighley's* case (1) does not show that the liability now contended for may not exist. The form in which that case came under discussion is not stated: but it was before the Court of Common Pleas, and therefore the proceeding could not have been a *mandamus* or a presentment. Probably the question arose upon a rate. All that the case decides is that, on a sudden emergency, the commissioners may take measures for the present repair; not that the proprietor is not liable ultimately. And this is consistent with the illustrations there given by Lord Coke, who says (2) that "in the case at bar, the law is grounded upon great reason: for although by the law one be bound to keep and repair it" (the wall), "yet *impotentia excusat legem*, and that which comes by the act of God, and is so inevitable, *that by no providence or industry of him that is bound, it can be prevented, shall not charge him: and therefore if tenant for life or years does not repair a sea-wall, so that by his fault the land is drowned, and becomes unprofitable, it is waste; but if the land is drowned by the extraordinary rage and violence of the sea without his fault, it is no waste; no more than if a house is burnt by lightning, or overthrown by the rage of the wind or tempest, without fault in the lessee, it is no waste." Yet in such cases the tenant would not the less be liable to repair within a reasonable time afterwards. In *Com. Dig. Wast*, (E. 5), it is said that the action of waste "does not lie, if the waste was by tempest, lightning, &c. if it be repaired in convenient time;" and *Keighley's* case (1) is referred to. The *dictum* accords also with that in *Rooke's* case (3).

(LITLEDAL, J.: *Comyns* also refers to *Co. Litt.* 53 a. In the following page (53 b) Lord Coke says, "It is waste to suffer a wall of the sea to be in decay, so as by the flowing and reflowing of the sea, the meadow or marsh is surrounded, whereby the same becomes unprofitable; but if it be surrounded suddenly by the rage or violence of the sea, occasioned by wind, tempest, or the like, without any default in the tenant, this is no waste punishable." There, the qualification is not added.)

(1) 10 Co. Rep. 139 a.

(3) 5 Co. Rep. 100 a.

(2) 10 Co. Rep. 139 b.

The tenant is exempted from any present penalty to which he might be liable, but is not excused from repairing in proper time. Any language in *Rex v. The Commissioners of Sewers for the Western Division of Somerset* (1), which may seem to support the argument for the defendants, was extra-judicial. The question there turned upon *the liability of the level to taxation in the first instance. Neither in that case nor in *Rex v. The Commissioners of Sewers for Essex* (2) was it considered whether in particular cases an individual may not be obliged to repair, although the mischief be done by sudden inundation and tempest. In the case of liability *ratione tenuræ* to repair bridges, a violent influx of water does not excuse the landowner. In many places, and particularly that now in question, it might be very difficult to decide, on evidence, what could be considered the ordinary and what the extraordinary operation of the elements.

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As to the rejection of evidence: the presentments were admissible on the principle, laid down in 1 Stark. on Ev. 260 (ed. 2), under the head "Inquisitions," that the subject matter is of public concern, and no one can properly be considered a stranger to it. The orders were admissible on similar grounds. They were not shown to have been acted upon; but they were themselves an act done: and they were in the nature of evidence of reputation, and therefore admissible, like the verdict (on which no subsequent proceeding had been grounded) in *Brisco v. Lomax* (3). At any rate, they were evidence against the lords of Porton.

Cur. adv. vult.

LORD DENMAN, Ch. J. in this Term, May 27th, delivered the judgment of the COURT:

In this case the defendants were charged, by reason of their tenure, with the repair of a sea-bank. The defence was, that the wall was in a state of repair sufficient to resist the ordinary action of tides and weather, and that the damage was done by an excessive and outrageous *tempest, and not by any of those accidents of ordinary occurrence to which such a liability must be restricted. The learned Baron who presided left this question to the jury, who thereupon acquitted the defendant. A rule for staying the judgment and proceedings, till a second trial could be had, was obtained, on account of this direction, as well as for the

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(1) 4 R. R. 659 (8 T. R. 312).

(3) 47 R. R. 549 (8 Ad. & El. 198).

(2) 25 R. R. 467 (1 B. & C. 477).

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rejection of evidence tending to show that the defendants and their predecessors who held the same lands had in fact repaired against the effects of the more violent tempests:

After argument, and consulting the authorities, we are clearly of opinion that a liability of a more extended nature may well exist by law. Many prescriptive liabilities to repair must have existed before the date of the earliest statute for the issuing of commissions of sewers: many such may now exist where no commission has issued: in such cases there is no legal reason to limit the liability by any thing but the ability of the party liable, or the value of the lands granted, as the case may be. And it is clear that a commission of sewers can have no effect upon these liabilities, other than to provide intermediately for the safety of the level, before the individual chargeable shall have been compelled, or be able to restore the defences. Callis (pp. 144, 145) is express that the commissioners are bound by precedent prescriptions, customs, and tenures, and we think that, rightly understood, there is nothing either in *Rooke's* (1) or *Keighley's* (2) cases that at all conflicts with the law as we have stated it.

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We do not take upon us to say what was the extent of the defendants' liability in the present case; but *there was evidence to show that it went beyond that to which the direction of the learned Judge might lead the jury to suppose it limited by law; and the jury therefore ought to have decided upon it as a matter of fact, upon all the evidence.

The evidence here rejected was two-fold. First: Orders of the court of sewers made a hundred years ago, which were deemed inapplicable, because they were not proved to have been carried into effect. Secondly: Presentments by the jury, to which the same objection was made. We are very clearly of opinion that such orders were good evidence, as adjudications by a court of competent jurisdiction over the subject-matter, unless they were affected by proof of fraud or collusion; and that at so great a distance of time their execution might well be presumed. On the admissibility of the presentments we prefer giving no opinion, as the facts are not quite clearly before us. Perhaps it may not be thought prudent to tender them on the next trial.

Rule absolute.

(1) 5 Co. Rep. 99 b.

(2) 10 Co. Rep. 139 a.

DOE D. GRAVES AND DOWNE v. WELLS AND
TROWBRIDGE.

1839.

June 3.

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(10 Adol. & Ellis, 427—437; S. C. 2 P. & D. 396; 8 L. J. (N. S.) Q. B. 265.)

A tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own.

EJECTMENT for lands in Wiltshire. The several demises were alleged in the declaration to have been made on 17th October, 1836, *habendum* for seven years, from 15th October, 1836. After pleas pleaded, Wells compromised with the lessors of the plaintiff, but Trowbridge continued to defend. On the trial before Patteson, J., at the Wiltshire Summer Assizes, 1837, it was proved, on the part of the plaintiff, that Graves, the lessor of the plaintiff, was entitled to the reversion upon a lease under which Trowbridge held, which lease was for ninety-nine years, to end in 1888, determinable on certain lives not yet expired, at a rent. It was further proved that, on 17th October, 1836, Graves's agent, in a conversation with Trowbridge, who was then in possession, demanded the rent of him, but Trowbridge then refused to pay it, and asserted that the fee was in himself. The counsel for the plaintiff contended that this was a disclaimer, working a forfeiture of Trowbridge's term; the defendant's counsel disputed this, and contended further that, even supposing this to be a forfeiture, the demise was laid too early, being on the very day of the supposed forfeiture. The learned Judge directed the jury to find for the plaintiff, if they were of opinion that the words used by Trowbridge were not mere idle language, but a serious claim of the fee. The jury having found for the plaintiff, the learned Judge reserved leave to the defendant's counsel to move to enter *a verdict for the defendant. In Michaelmas Term, 1837, *Crowder* obtained a rule accordingly.

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Erle and *Barstow* now showed cause :

As to the day of the demise, *Roe d. Wrangham v. Hersey* (1) shows that it may be the day on which the title of the lessor of the plaintiff accrues. There the title, it is true, accrued by death of the ancestor, not, as here, by disclaimer; but that can make no difference. *Doe d. Lewis v. Cawdor* (2) was a case of disclaimer: but in that case there was nothing to carry back the disclaimer

(1) 3 Wils. 274.

(2) 40 R. R. 615 (1 Cr. M. & R. 398;
4 Tyr. 852).

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even to the day of the demise. Secondly, the disclaimer here worked a forfeiture. That takes place wherever the tenant does any act inconsistent with the relation of landlord and tenant, especially if derogatory to the landlord's title. In *Doe d. Ellerbrock v. Flynn* (1) the tenant gave up possession to a hostile claimant, in fraud of the landlord, for the purpose of enabling the claimant to set up the adverse title against the landlord: and this was held to be a forfeiture of the tenant's term. So a disclaimer dispenses with a notice to quit, even where it is doubtful whether there be a term to which the disclaimer will apply; here the term is clearly shown to have existed at the time of the disclaimer.

(LITLEDAL, J.: There are several cases in Com. Dig., Forfeiture (2), of forfeiture by acknowledging a hostile title on record.)

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In *Hovenden v. Lord Annesley* (3) Lord REDESDALE assumed that the assenting by a tenant to the *claim of a stranger was a forfeiture. It is not necessary that the disclaimer should be on record: a record is merely a stronger evidence than an act *in pais*. In the case of *Lord Dormer's ejectment* (4) it was held that a term was forfeited, where a termor assigned it to a trustee, and then made a feoffment to gain the freehold. The principle, according to *Mr. Preston* (5), is that the term is forfeited by the fraud of the termor in attempting to gain the freehold; and that the admission (by the assignee) of a title to the reversion in a stranger is an attornment, which works a forfeiture, because it is an abandonment of the tenancy and a destruction of the privity between the termor and the reversioner.

(LITLEDAL, J.: What is the act done in the present case?)

The making a claim of the freehold by the termor.

(LITLEDAL, J.: Is that an act?)

It is an act within the principle of the authorities. In 4 Bac. Abr. 884, Leases, [T. 2], it is said, "Here it is to be observed, that any act of the lessee, by which he disaffirms or impugns the title of his lessor, occasions a forfeiture of the lease. For to every lease the law tacitly annexeth a condition, that if the lessee do

(1) 40 R. B. 515 (1 Cr. M. & R. 137;
4 Tyr. 619).
(2) See (A 5).

(3) 9 R. B. 119 (2 Sc. & Lef. 607).
(4) 3 B. & C. 399, n.
(5) 7th ed.

any thing that may impair the interest of his lessor, the lease shall be void, and the lessor may re-enter. Indeed, every such act necessarily determines the relation of landlord and tenant; since to claim under another and at the same time to controvert his title, to hold under a lease, and at the same time to destroy the interest out of which the lease ariseth, would be the most palpable inconsistency. A lessee may thus incur a forfeiture of his estate by act **in pais*, or by matter of record." No instances perhaps can be adduced of a forfeiture of a term for a given number of years by mere words claiming the title: but such a case is clearly within the principle. If a stranger bring waste against the tenant, and the tenant plead no waste done, the term is forfeited (1). That is on the ground that such pleading creates a difficulty to the landlord. A conveyance to operate by the statute of uses works no forfeiture, because, being innocent, it does not hurt the title of the landlord. A tenancy from year to year is put an end to, without notice, by a disclaimer. There can be no distinction, in this respect, between a term for a given number of years, and a tenancy from year to year: there might be a term created for a hundred years determinable at any time by half a year's notice from either party. The greater number of the old authorities indeed speak of a forfeiture of a life estate; but this arises only from terms being comparatively modern. A forfeiture of a tenancy from year to year is, legally, a forfeiture of a term: the decisions, in such cases, have not rested upon the principle that the disclaimer showed that no term existed, for then no notice would have been necessary at all; whereas the professed principle has always been that notice was dispensed with by the disclaimer. Thus, "if a tenant hold from year to year, the landlord cannot maintain an ejectment without giving six months' previous notice, unless the tenant have attorned to some other person, or done some other act disclaiming to hold as tenant to the landlord; and in that case no notice is necessary:" *Throgmorton v. Whelpdale* (2). In **Doe d. Gray v. Stanion* (3) a tenant from year to year claimed verbally to hold the estate as his own, but under such circumstances that the Court considered the claim not necessarily inconsistent with the tenancy; and, therefore, it was held that there was no forfeiture:

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(1) Com. Dig., Forfeiture, (A 5), citing Co. Lit. 252 a, and 1 Rol. Abr. 853. Estate, (G), pl. 11.

(2) Bul. N. P. 96.

(3) 46 R. R. 464 (1 M. & W. 695, Tyr. & G. 1065). See *Doe d. Williams v. Cooper*, 1 Man. & G. 135.

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but the COURT said, "it does not appear to be necessary that any act should be done, as distinguished from a verbal disclaimer; a disavowal by the tenant of the holding under the particular landlord, by words only, is sufficient;" adding, "but, in order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant; or to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it." These remarks establish fully the doctrine for which the plaintiff contends; and this, as well as the case of *Hovenden v. Lord Annesley* (1), show that Lord Coke is incorrect in saying that an attornment *in pais* works no forfeiture: Co. Lit. 252 a. In *Doe d. Lewis v. Cawdor* (2) the disclaimer insisted upon was by letters: but there was no forfeiture, because the Court thought the language of the letters did not go far enough. In *Doe d. Grubb v. Grubb* (3) it was held that a tenancy from year to year was determined by the tenant having written a letter to the reversioner's attorney, stating that his connection as a tenant had ceased for several years. A copyholder's estate is, on a feudal principle, similar to that now contended for, forfeited *by default of attendance where there is sufficient notice: *Sir John Braunche's* case (4), *Anonymous* case in *Godbolt* (5), where it is said that a refusal by a copyholder to pay rent, because he hath it not, "is no forfeiture, but the denial ought to be a wilful denial;" which shows that a wilful denial will work a forfeiture. It may be urged that tenancies will be endangered by applying the rules of forfeiture so stringently: but the Court will not deviate from the authorities upon such considerations. The Legislature, when they provided against surrenders not made by writing, in stat. 29 Car. II. c. 3, s. 3, did not prohibit forfeitures by word of mouth.

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Crowder and Butt, contra :

Supposing the Court to be of opinion that the case, as to the first point, is within the authority of *Roe d. Wrangham v. Hersey* (6), still there is here no forfeiture. Assuming the language to have been as strong as possible, and to have amounted to a distinct repudiation of the landlord's title and a claim of the freehold by

(1) 9 R. R. 119 (2 Sch. & Lef. 607).

(4) 1 Leon. 104.

(2) 40 R. R. 615 (1 Cr. M. & R. 398,

(5) Godb. 142, pl. 173.

4 Tyr. 852).

(6) 3 Wils. 274.

(3) 10 B. & C. 816.

the tenant, yet there is no authority for treating this as a forfeiture of the term. It is true that a lease for years may be subjected to forfeiture under the same circumstances as a life estate; but in neither of the passages referred to, on the other side, in Bacon and Comyns, is there any instance of a forfeiture of estate by mere words. From Co. Lit. 251 a, 251 b, 252 a, it appears that a forfeiture may be worked by alienation, and that either *in pais* or by matter of record; or by claiming too great an estate, or affirming the reversion or remainder to be in a stranger, and *these only by matter of record. But even a feoffment without livery, or a conveyance in fee by lease and release, work no forfeiture, because, though they are in principle disavowals of the reversioner's right, they divest no estate. It is said that the effect of a record is merely to strengthen the evidence: but the authorities confine forfeitures of this kind to matter of record. Thus in 3 Bac. Abr. 196 (1), Estate for Life and Occupancy, (C), it is said, "Another way of forfeiture in a court of record is, by claiming a greater estate than he had by the feudal donation, or by affirming the reversion to be in any other person than his lord. This seems to be grounded on a rule in the old feudal law, that if a vassal denied that he held the feud of his lord, and it was proved against him, such a denial was a forfeiture. Now this denial may be when the vassal claims the reversion himself, or accepts a gift of it from a stranger, or acknowledges the reversion to be in a stranger; for in all these cases he denies that he holds the feud from the lord: but, as by the feudal law the vassal was to be convicted of this denial, so in our law these acts, which plainly amount to a denial, must be done in a court of record, to make them a forfeiture; for such act of denial appearing on record is equivalent and equally conclusive as a conviction upon solemn trial; and all other denials, that might be used by great lords for trepanning their tenants, and for a pretence to seize their estates, by our law were rejected, for such convictions might be made by such great lords where there was no just cause: but the denial of the tenure upon record could never be counterfeit, or be abused to any injustice; *and therefore this notorious and solemn act of the tenant was retained as a just cause of forfeiture by our law." In the words following the passage cited on the other side from 4 Bac. Abr. 884 (1), Leases and Terms for Years, [T. 2], the forfeiture by act *in pais* is confined to alienations which displace the estate of the reversioner. The

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doctrine of disclaimer was perhaps carried farther in *Doe d. Ellerbrock v. Flynn* (1) than elsewhere: but even there the tenant had done an act by giving up the possession for the purpose of defeating his landlord's title. Here there is no act done; and the landlord does not appear to be in any way damnified. The Statute of Frauds, 29 Car. II. c. 3, s. 3, has been referred to; but it is clear that the general intent of the Legislature was to provide against the effect of mere oral declarations. Forfeitures by words spoken were not provided against, because they were not recognised before. The *dictum* in *Hovenden v. Lord Annesley* (2) is, as admitted on the other side, contrary to the doctrine of Lord Coke: and, as the decision in that case was, that there was no forfeiture under the particular circumstances, the *dictum* is extra-judicial: but, assuming it to be correct, an attornment is still an act. It is true that notice to quit may be dispensed with in the case of tenancies from year to year by proof of words spoken by the tenant: but that is because such a tenancy is from year to year so long as the parties please: and such words may be proof that the will of the tenant was determined. Such cases are not instances of forfeiture at all. As was said by BEST, Ch. J. in *Doe d. Calvert v. Frowd* (3), "a notice to quit is only *requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy, there can be no necessity for a notice to end that which he says has no existence." *Throgmorton v. Whelpdale* (4), *Doe d. Gray v. Stanion* (5), *Doe d. Grubb v. Grubb* (6), were cases of tenancy from year to year: and no greater estate was shown to exist in the defendant in *Doe d. Lewis v. Cawdor* (7).

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LORD DENMAN, Ch. J. :

I think *Doe d. Ellerbrock v. Flynn* (8) is distinguishable from the present case. There it was thought that the tenant had betrayed his landlord's interest by an act that might place him in a worse condition: if the case went farther than that, I should not think it maintainable. The other instances are cases either of disclaimer upon record, which admit of no doubt as to the nature of what is done, or of leases from year to year, in speaking of which the

(1) 40 R. R. 515 (1 Cr. M. & R. 137, Tyr. & Gr. 1065).
4 Tyr. 619).

(2) 9 R. R. 119 (2 Sch. & Lef. 607).

(3) 29 R. R. 624 (4 Bing. 557).

(4) Bul. N. P. 96.

(5) 46 R. R. 464 (1 M. & W. 695,

(6) 10 B. & C. 816.

(7) 40 R. R. 615 (1 Cr. M. & R. 398,

4 Tyr. 852).

(8) 40 R. R. 515 (1 Cr. M. & R. 137,

4 Tyr. 619).

nature of the tenancy has been sometimes lost sight of, and the words "forfeiture" and "disclaimer" have been improperly applied. It may be fairly said, when a landlord brings an action to recover the possession from a defendant who has been his tenant from year to year, that evidence of a disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy, from its particular nature, was limited. But no case, I think, goes so far as the present: and I feel the danger of allowing an interest in law to be put an end to by mere words.

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LITLEDALE, J. :

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We should not, indeed, be justified in putting an end to a state of law on account of its danger; for we must give parties whatever the law entitles them to: but here the law leads to no such consequence. The case is not like that of a tenancy from year to year, which lasts only as long as the parties please, and where what has been called a disclaimer is evidence of the cessation of the will. Here property is claimed on the ground of forfeiture. Now, assume the jury to have been right in their verdict: still the facts do not go far enough for a forfeiture. In Comyns's Digest, tit. Forfeiture, and in Viner's Abridgment, tit. Estate (1), a very great number of instances of forfeiture are given; but there is no allusion to any case of this kind: the instances are either of matters of record, or of acts *in pais* quite different from what is here insisted upon. In an *Anonymous* case in *Godbolt* (2) the tenant claimed the fee on the record, in an action of debt; and yet it was held to be no forfeiture. *Doe d. Ellerbrock v. Flynn* (3) has been satisfactorily distinguished by my Lord.

PATTESON, J. :

No case has been cited where a lease for a definite term has been forfeited by mere words. We know that mere words cannot work a disseisin, although some acts have been held to work a disseisin at the election of the party disseised, which, as against him, would not work a disseisin. An attornment again is an act. Here there is no act; and, if we held that there was a forfeiture, we should be going much beyond any *previous decision. It is sometimes said that a tenancy from year to year is forfeited by disclaimer: but

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(1) See 10 Vin. Abr. 370 sqq. (3) 40 R. R. 515 (1 Cr. M. & R. 137, Forfeiture, (C. b), &c. 4 Tyr. 619).

(2) Godb. 105, pl. 124.

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it would be more correct to say that a disclaimer furnishes evidence in answer to the disclaiming party's assertion that he has had no notice to quit; inasmuch as it would be idle to prove such a notice where the tenant has asserted that there is no longer any tenancy.

WILLIAMS, J. concurred.

Rule absolute (1).

1839.
June 4.
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GARDNER AND OTHERS v. MOULT AND THREE OTHERS.

(10 Adol. & Ellis, 464—469; S. C. 2 P. & D. 403; 8 L. J. (N. S.) Q. B. 270.)

Where a petitioning creditor, having ascertained that an agent in his service could prove an act of bankruptcy, sent him for that purpose to be examined on the opening of the fiat: Held, that the deposition, then made, was evidence of the act of bankruptcy as against the creditor, in an action against him by the assignees, in which the act of bankruptcy was put in issue.

ASSUMPSIT for money had and received for the use of plaintiffs, as assignees of Strutton. Account stated.

Pleas. 1. That Strutton did not commit any act of bankruptcy before the issuing of the fiat in bankruptcy against him. 2. *Non assumpsit*. 3. That, before the issuing of the fiat, the sum mentioned in the first count was *bonâ fide*, and not by way of fraudulent preference, paid by Strutton to the copartnership on account of a larger sum in which he was then indebted to the copartnership for money lent to, and paid, laid out and expended, by the copartnership for, him at his request, &c.; and that the copartnership had not, before or at the time of such payment, notice of any act of bankruptcy committed by Strutton. Verification. 4. That the payments were made to the Bank on a current banking account between Strutton and the Bank; that advances had since been made to him by the Bank on the credit of such payments; and that, at the times when such payments were made by Strutton, and the advances were made to him by the Bank, the copartnership had no notice of any act of bankruptcy. Verification. 5. Plea of mutual credit, with a similar averment of no notice of any act of bankruptcy.

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Replication to 1st plea, that Strutton did commit an act of bankruptcy before the issuing of the fiat. To the 3rd, 4th, and 5th pleas, that the copartnership had, before and at the respective times of payment, &c., notice of an act of bankruptcy. Defendants gave notice, before trial, of their intention to dispute the act of

(1) See note (b) to *Sir Simon Leech's case*, Freem. K. B. and C. P. 503.

bankruptcy, or that Strutton had committed any before or at the time of issuing the fiat.

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At the trial, before Coltman, J., at the Liverpool Summer Assizes, 1837, the only evidence of the act of bankruptcy offered by the plaintiffs was a deposition made by one D. Hay, the manager of a branch establishment of the same banking copartnership at Chester. The directors of the Bank had struck a docket against Strutton, upon which the fiat issued; and their solicitor, upon discovering that Hay was able to prove an act of bankruptcy, sent him to Manchester, where a fiat was opened upon a deposition made by him, showing that Strutton had absented and secreted himself with intent to defeat his creditors on certain occasions, and at certain times, therein specified. Hay was not a shareholder; nor had he any connection with the Bank but as manager.

The evidence was objected to as inadmissible, especially as issue was joined on the act of bankruptcy, and a notice was given to dispute it. The learned Judge admitted it. Verdict for plaintiffs.

In the following Michaelmas Term *Sir F. Pollock* obtained a rule *nisi* to enter a nonsuit, or for a new trial.

Cresswell and *Alexander* now showed cause :

An affidavit used by a party is always admissible against *him. This is an affidavit by an officer of the Company, made by their direction, in support of their own proceeding, and used by their solicitor. It is therefore evidence against the defendants as much as if it had been a statement by the defendants themselves: *Brickell v. Hulse* (1). Besides, the Bank directors, having themselves struck the docket and obtained the fiat, are not in a condition to dispute the bankruptcy. Thus, the petitioning creditor cannot show that the debt was insufficient to support the commission: *Harmar v. Davis* (2); or dispute the bankruptcy: *Ledbetter v. Salt* (3). So admissions by a defendant of the plaintiffs' character will dispense with strict proof of their title as assignees, even where their title is distinctly put in issue, and there is a notice of an intention to dispute it: *Inglis v. Spence* (4). Where trespass was brought by a bankrupt to try the validity of the commission, evidence of his having applied to this Court to be discharged from custody on the ground that he was a bankrupt and that the defendant, at whose suit he was in custody, had proved his debt,

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(1) 45 B. R. 750 (7 Ad. & El. 454).

(2) 7 Taunt. 577.

(3) 4 Bing. 623.

(4) 1 Cr. M. & R. 432, 5 Tyr. 8.

GARDNER was held conclusive against the plaintiff: *Watson v. Wace* (1).
 r.
 MOULT. Hay was not a mere witness for the Bank, but was identified with them for the purposes of the affidavit and fiat.

Sir F. Pollock, Wightman, and Couling, contra :

[*467] The doctrine, that they who take out a fiat shall not deny the bankruptcy, is not disputed. The question here was, not merely whether Strutton was a bankrupt, but *whether an act of bankruptcy had been committed by him at a certain time. The date was material, because the payments sought to be recovered were alleged to have been made after notice of the bankruptcy. There is no rule of evidence that a party shall be affected by an affidavit made on his behalf. It might as well be contended that the testimony of a witness at *Nisi Prius* is admissible evidence, on any future occasion, against the party who called him.

In *Chambers v. Bernasconi* (2), where the act of bankruptcy was in issue, and the place was material, the Court decided that depositions of deceased witnesses, taken before the commissioners on the opening of the commission and enrolled by the assignees, were not evidence against the latter. In *Atkins v. Humphreys* (3) the plaintiff was not permitted to put in evidence a deposition, made by a witness in a suit in Chancery between the defendant and a third party and used by the defendant on that occasion, for the purpose of proving a fact mentioned in such deposition. In *Brickell v. Hulse* (4) a distinction was taken between a deposition in equity (which this resembles) and an affidavit. There might have been two depositions taken in proof of the bankruptcy, and they might have been contradictory: which of them would then be evidence? Hay was neither director nor shareholder, but a mere witness tendered by the Bank and examined orally, whose testimony was taken down by the proper authority. No more use was made by the defendants of *his statements, than was made of the depositions which were held inadmissible in *Chambers v. Bernasconi* (2).

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LORD DENMAN, Ch. J. :

The examination or deposition of Hay was clearly admissible evidence. The defendants send their servant to prove an act of

(1) 5 B. & C. 153.

(3) 1 M. & Rob. 523.

(2) 40 R. R. 604 (1 Cr. M. & R. 347,
 4 Tyr. 531).

(4) 45 R. R. 750 (7 Ad. & El. 454)

bankruptcy; and they act on the statement made by him. There is no necessity for entering into the general doctrine. No doubt a party in a cause is not bound by all that his witnesses say at *Nisi Prius*, or in their depositions in Chancery. But the defendants are here bound by the particular statement which their agent was sent to make.

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LITLEDALE, J. :

The deposition is evidence as much as if it had been made by the defendants themselves. They sent him for the purpose of making it, and they adopted it.

PATTESON, J. :

The distinction pointed out in *Brickell v. Hulse* (1) is a sound one, and I do not intend to depart from it; but it is not material by what name the document is called. It is in substance an affidavit within the meaning of the distinction there laid down, though called a deposition. Hay therein makes a statement of facts, which the petitioning creditors had previously ascertained from him that he was able to make. He says nothing but what they knew he would say, and was subject to no cross-examination. *Chambers v. Bernasconi* (2) is not in point. The depositions were *there offered against the assignees, and not, as here, against the petitioning creditor.

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WILLIAMS, J. :

The solicitor of the defendants is employed by them to obtain evidence of a certain fact in order to support a fiat. For that purpose he produces the deponent, who swears to the specific fact which he was expressly called to prove. Under such circumstances, the affidavit is like one made by the principal, and admissible by the same rule. The question, too, is not what it proves, but whether, upon this record, it was admissible at all.

Rule discharged.

(1) 45 R. R. 750 (7 Ad. & El. 454).

(2) 40 R. R. 604 (1 Cr. M. & R. 347,
4 Tyr. 331).

1839.
June 5.

TREWHITT v. LAMBERT.

(10 Adol. & Ellis, 470—471.)

[470]

A witness, produced to prove a parol demise from plaintiff to defendant, stated that, at the time of making it, plaintiff looked at written minutes, from which he appeared to read the terms, to which defendant assented: Held, that in the absence of any further proof respecting the nature of the minutes, parol evidence of the terms of the demise was admissible.

ASSUMPSIT on an agreement for repairing premises, whereof defendant was tenant to the plaintiff. Plea, *non assumpsit*. At the trial before Coleridge, J., at the sittings at Westminster in this Term, a clerk of the plaintiff was called to prove the agreement. The witness had been present at the making of the agreement; upon which occasion the plaintiff read to the defendant the terms of the agreement from some writing held in his hand at the time. It was not proved what the writing was; nor was it shown to the defendant, or signed by him. The defendant assented to the terms: and shortly afterwards the witness wrote down the terms in a book, which he produced in Court, and by which he refreshed his memory after trial. It was objected, on the part of the defendant, that the writing ought to be produced. The learned Judge over-ruled the objection; and the jury found for the plaintiff. In this Term (1),

Ball moved for a new trial, on the ground that the agreement was in writing, and that parol evidence of it was therefore inadmissible. He distinguished *Doe d. Bingham v. Cartwright* (2) from the present case by the circumstance that the memorandum must here have contained the terms, not of a mere proposal, but of an accepted agreement. *Rex v. Wrangle* (3) was also referred to.

Cur. adv. vult.

[471] LORD DENMAN, Ch. J. now delivered the judgment of the Court:

This was a motion for a new trial on account of the admission of parol evidence of a lease, which in fact was written. The fact was, that the plaintiff had taken down in pencil writing some minutes of the letting, and read them over to the defendant, who agreed to them. They were afterwards entered in a book by the witness, who, having been present at the discourse, refreshed his memory by the book. It was said that the original minutes ought to have

(1) May 31st. Before Lord Denman,
 Ch. J., Littledale, Patteson, and
 Williams, JJ.

(2) 22 R. R. 413 (3 B. & Ald. 326).
 (3) 2 Ad. & El. 514.

been produced. But there was no proof what these minutes were: the plaintiff had never said that they constituted the lease: it was proved only that the plaintiff looked upon a paper, and appeared to call over from it the terms of the intended lease. It might have been all in cyphers and shorthand for his own use, in no legible form. There was nothing shown to have ever existed that would have conveyed any information to the Court or jury.

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Rule refused.

SANDYS v. HODGSON.

(10 Adol. & Ellis, 472—477; S. C. 2 P. & D. 485; 9 L. J. (N. S.) Q. B. 31.)

1839.
June 6.

[472]

Defendant brought trover against D. for a dog, and obtained a verdict for 50*l.* damages, subject to be reduced to 1*s.* on the delivery of the dog to defendant. By plaintiff's authority D. delivered the dog to defendant, at the same time demanding it back on behalf of plaintiff, as his property, at a time named. Afterwards, at the time named, plaintiff demanded the dog, and defendant refused to deliver it.

Plaintiff brought trover; defendant traversed plaintiff's property, and also pleaded Not guilty, and Leave and licence. Plaintiff new assigned to the plea of Leave and licence; to which defendant pleaded Not guilty, and leave and licence; to which last plea plaintiff replied *de injuriâ*.

Held, that plaintiff was not precluded from proving his title by having authorised the delivery; and that, on proof of title, he was entitled to a verdict on all the above issues.

TROVER for a dog.

Pleas. 1. That the dog was not the property of the plaintiff. 2. Not guilty. 3. That the defendant converted by the leave and licence of the plaintiff.

The replication joined issue on the first and second pleas, and, as to the third, new assigned a fresh conversion.

To the new assignment the plaintiff pleaded, 1st, Not guilty 2nd, Leave and licence.

On the first of these pleas the plaintiff joined issue, and to the second replied *de injuriâ*.

On the trial before Coltman, J., at the Summer Lancaster Assizes, 1837, the following facts appeared. At the Lancaster Spring Assizes, 1837, the defendant brought two actions of trover for the same dog, which was the subject of the present action, one against a person named Dowbiggen, the other against the present plaintiff. The defendants in each of these actions traversed Hodgson's property. *Hodgson v. Dowbiggen* was tried first, and a verdict given for the then plaintiff Hodgson, damages 50*l.*, to be reduced to 1*s.* if the dog should be delivered up to Hodgson before the

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fourth day of the following Term. Afterwards *Hodgson v. Sandys* was tried; but, Sandys calling Dowbiggen as a witness, a verdict was found for the defendant on the plea denying Hodgson's property. Before the day named for the *delivery of the dog, Dowbiggen, and the attorney who had conducted the defences in each cause, brought the dog (with a shilling) to Hodgson, and offered it to him, giving him at the same time a written notice demanding the dog as Sandys's property, and on his behalf, and stating that they should call for it at a time named. Hodgson received the dog; and the attorney called for it at the time appointed, and demanded it; but Hodgson refused to give it up. On the trial of the present action the plaintiff gave evidence of his title to the dog, and produced the record of the former action of *Hodgson v. Sandys*; and the defendant produced the record of *Hodgson v. Dowbiggen*; and it was shown that Dowbiggen and the attorney had acted by the plaintiff's authority. For the defendant it was contended that the plaintiff had precluded himself from setting up his title in this action; and that no conversion was proved which was not justified by the leave and licence first pleaded and admitted by the plaintiff. Verdict for plaintiff, with leave for the defendant to move for a nonsuit.

In Michaelmas Term, 1837, *Joseph Addison* obtained a rule for a new trial or a nonsuit (1).

Cresswell and *Alexander* now showed cause :

[*474]

First, there is no ground for arguing that the evidence of conversion, furnished by the refusal of the defendant to redeliver the dog, is met by what took place before. Independently of the plaintiff's consent, the fact is simply that Dowbiggen gave up to the defendant possession of that which belonged to the plaintiff. So far therefore the defendant gained no title except as against Dowbiggen; and the plaintiff was entitled to sue. Then, *as to the plaintiff's conduct, there is nothing to divest him of his title. There is no estoppel by record; and, as to the plaintiff's consent, he merely allows Dowbiggen to satisfy the condition of the former verdict, by giving up, as between Dowbiggen and the defendant, the possession, which, as between those two, Dowbiggen was not entitled to retain. But this was not, either in form or fact, an abandonment of the plaintiff's right to assert his title against the defendant. If the defendant was not satisfied with the delivery on

(1) Also for reduction of damages; but on this there was no decision.

these terms, of which he was cognisant from the written notice, he should have refused to receive the dog.

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Secondly, there is nothing in this record to vary the above view. The conversion by leave and licence took place when possession of the dog was delivered by Dowbiggen to the defendant. Taking property of another, by assignment from a party who has no authority to dispose of it, is a conversion: *M'Combie v. Davies* (1). That took place here by leave and licence, which justifies the conversion, but does not prevent the transaction from being a conversion. If the defendant meant to contend that it did, he should have taken issue on the conversion, and have given the leave and licence in evidence. Then afterwards, by the defendant's refusal to redeliver, the conversion took place which is now assigned. This satisfies the rule laid down in note (6) to *Greene v. Jones* (2), that two trespasses must be proved where there is a new assignment.

Joseph Addison and W. H. Watson, contra :

The plaintiff first treats the defendant as the owner of the *dog, and then claims it as his own.

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(PATTESON, J. : He treats the defendant as entitled to the possession as between the two, Dowbiggen and the defendant. Why is that inconsistent with claiming the property as against the defendant? If a party comes in to defend an ejectment, and is personally estopped as against the plaintiff, and a verdict passes for plaintiff, the tenant in possession may give up possession, and then sue the lessor of the plaintiff.)

Here the plaintiff has been a party to a fraudulent delivery, for the purpose of defeating the defendant's claim. The Court will not allow him now to avail himself of the title which he has fraudulently held back: 3 Bac. Abr. 774, &c. (7th ed.), Fraud (B.); *Clare v. The Earl of Bedford* (3); *Cockshott v. Bennett* (4); *Leicester v. Rose* (5); *Jackson v. Duchaire* (6); *Goodale v. Wyat* (7). In Co. Lit. 357 b it is said, "So it is in all cases where a man hath a rightful and just cause of action; yet if he of covin and consent do raise up a tenant by wrong against whom he may recover, the covin doth suffocate the right, so as the recovery, though it be upon a good title, shall not bind or restore the demandant to his right."

(1) 8 R. R. 534 (6 East, 538).

(2) 1 Wm. Saund. 299 a.

(3) Cited in *Hunsden v. Cheyney*,
2 Vern. 151.

(4) 1 R. R. 617 (2 T. R. 763).

(5) 4 East, 372.

(6) 3 T. R. 551.

(7) Poph. 99.

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(LORD DENMAN, Ch. J. : What does the fraud consist in? In allowing the defendant to take the dog, or in getting the damages reduced?)

In giving a delusive possession, the defendant being entitled, either to the full damages, or to a *bonâ fide* surrender of the property. It is an acknowledged principle, that a party, who aids a transaction in which a state of facts is taken for granted on all sides, shall not afterwards be allowed to deny those facts, however the truth may be: *Pickard v. Sears* (1).

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Then, as to the new assignment, no second conversion was proved. The dog being delivered up to the defendant by the plaintiff's consent, there was no conversion in afterwards refusing to redeliver.

Cur. adv. vult.

LORD DENMAN, Ch. J. afterwards, in this Term (June 11th), delivered the judgment of the Court. After stating the facts, his Lordship proceeded as follows:

On the trial it was contended that Sandys's conduct precluded him from setting up any claim of property in the dog, as it plainly led Hodgson to believe it his (Hodgson's) property. And recourse was had to the principle lately expounded in *Pickard v. Sears* (2), which runs through many cases in equity, and is thus stated by Sugden (3 Vend. & Purch. 428 (3)): "If a person having a right to an estate permit or encourage a purchaser to buy it of another, the purchaser shall hold it against the person who has the right."

But we cannot apply that doctrine to the case before us; because we do not perceive how Sandys induced Hodgson to become the purchaser of the dog. For, in the first place, he did not become the purchaser, but only established a right of action against Dowbiggen as a wrong doer; and, secondly, Sandys cannot be said to have persuaded him that he admitted his title, having himself so lately claimed to hold the dog against him.

If, indeed, it had been proved that Hodgson was induced by Sandys's conduct to enter into a disadvantageous compromise of the action, there might have been some difference. But we do not

(1) 45 R. R. 538 (6 Ad. & El. 469).
See *Gregg v. Wells*, p. 347, *ante* (10 Ad.
& El. 90).

(2) 45 R. R. 538 (6 Ad. & El. 469).
(3) 10th ed.

know that it was such. Hodgson *may have entitled himself to recover the dog against Dowbiggen; and it would then be just to enter a verdict for what may be the whole amount of the damages laid in the declaration, called penal damages, to compel restitution: but the fact of conversion may have entitled Hodgson to no more damages than the 1s. actually paid. And this arrangement between them, as far as appears, was wholly independent of the question of property as between Sandys and Hodgson. For, though Sandys may have claimed through Dowbiggen, there is no inconsistency in supposing that Dowbiggen was in such a position towards Hodgson as to have no defence against him, and yet that Sandys was entitled as owner to recover it from Hodgson.

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Rule discharged.

WILLIAMS v. BURGESS.

(10 Adol. & Ellis, 499—503; S. C. 2 P. & D. 422; 8 L. J. (N. S.) Q. B. 286.)

1839.
June 7.
[499]

Plaintiff entered into a parol agreement to sell to defendant a mare for 20*l.* subject to the condition that, if it should prove to be in foal, defendant should, on receiving 12*l.* from plaintiff, return it on request. Plaintiff delivered the mare and received 20*l.* On its proving to be in foal, he tendered to defendant 12*l.*, and requested him to return the mare, which defendant refused to do. Held, that the contract to return it on payment of 12*l.* was not a distinct contract of sale, but one of the conditions of the original sale to defendant; and that the delivery of the mare to the defendant took the whole agreement out of the Statute of Frauds (1), so as to enable plaintiff to sue defendant for the refusal to return it.

ASSUMPSIT. Declaration stated that, in consideration plaintiff would sell and deliver to defendant a mare, which plaintiff supposed to be in foal, for 20*l.*, subject to the condition that, if the mare should prove to be in foal, defendant should, on receiving 12*l.* from plaintiff, return it to plaintiff on request, defendant promised, if it proved in foal and plaintiff paid 12*l.*, to return it. Averment of sale and delivery of the mare for 20*l.*, subject to the above condition; that it proved to be in foal; that plaintiff then tendered to defendant 12*l.* and requested him to return the mare; but defendant refused so to do. Plea, *Non assumpsit*.

On the trial at the York Summer Assizes, 1837, before PARKE, B., the plaintiff proved a verbal agreement, as *stated above, and the acceptance of the mare and payment of the money by the defendant. It was objected, on the part of the defendant, that the agreement

[*500]

(1) See now The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4.—R. C.

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on which the action was brought was a distinct agreement for a re-sale of the mare within sect. 17 of the Statute of Frauds, 29 Car. II. c. 3, and ought to have been in writing. But the learned Judge, considering it to be merely a qualification of the original contract of sale, which was executed, over-ruled the objection, reserving leave for the defendant to move to enter a nonsuit, and for the plaintiff to object that this defence could not be shown upon the plea of *Non assumpsit*. There was a verdict for the plaintiff.

In Michaelmas Term, 1837, *Knowles* obtained a rule *nisi* to set aside the verdict on the points reserved, and enter a nonsuit.

Alexander now showed cause :

The objection is not open upon the general issue. (Upon this point *Elliott v. Thomas* (1), on section 17 of the Statute of Frauds, and *Buttmere v. Hayes* (2), on the fourth section, were cited (3) ; but, as the Court pronounced no opinion upon it, the argument is here omitted.) The contract for resale is not a distinct and independent one, but part of the original one, which was made good by acceptance of the mare and payment of the price. That the delivery was sufficient to take the case out of the statute is shown by many authorities.

[*501] (*Knowles*, for the defendant, stated that he did not dispute those authorities, *and admitted that the original agreement was made good by delivery.)

Then the condition to re-deliver cannot make it void. A state of things, contemplated by the original contract and parcel of it, has arisen, which now entitles the plaintiff to sue without any fresh payment or writing.

Knowles, contra :

There are two distinct contracts ; one is executed ; the other executory. Both are within the statute ; and the latter cannot be enforced, for want of the proper formalities.

(LORD DENMAN, Ch. J. : Suppose the whole had been in writing at first, would it require two stamps ?)

- (1) 49 R. R. 558 (3 M. & W. 170). *Kenyon*, argued in this Term (19th June) upon the fourth section ; and
- (2) 5 M. & W. 456. this Court then intimated its adherence
- (3) The decisions in the Exchequer were cited in a case of *Eastwood v.* to those decisions.

Perhaps not; but that is not a proper test. It is certain that an agreement may contain two distinct stipulations capable of being treated as distinct contracts, of which one may be void and the other good: *Wood v. Benson* (1).

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(PATTESON, J. : I think that, when that case has been cited, the Courts have not been disposed to extend it.)

There are two agreements entered into at the same time. Suppose the agreement had stipulated that, in a certain event, the defendant should sell and deliver to the plaintiff another horse, or the foal itself: a writing would then have been necessary; for there would be no acceptance of any thing by the buyer, but only by the defendant, the seller; yet it cannot, in principle, make any difference that the horse to be sold happens to be the same. *Watts v. Friend* (2) is nearly in point. There the agreement was, that the plaintiff should furnish the defendant with seed; that the defendant should sow it on his own land; and should sell and deliver to the plaintiff the *whole crop of seed produced therefrom. The plaintiff supplied the seed; and the defendant accepted and sowed it, but refused to sell the crop according to the agreement. It was held that, as the agreement was not in writing, the Statute of Frauds was a defence. Yet it might have been urged that the contract required no writing, because there was a delivery of the seed to the defendant.

[*502]

LORD DENMAN, Ch. J. :

This is a sale by the plaintiff to the defendant on particular terms, one of which is a return of the article sold in a certain event; the acceptance of the thing sold takes the whole contract out of the statute. The case differs from *Watts v. Friend* (2), where the re-sale was of a different thing.

LITLEDALE, J. :

The plaintiff is willing to part with his property on certain conditions, which are part of the agreement. It is not an independent contract of sale on which he sues, but the original contract, which was a qualified sale. It is like the case of the delivery of a horse on trial; when the buyer returns it, after trial, it is not a re-sale. I have not the slightest doubt on the case.

(1) 37 R. R. 635 (2 Cr. & J. 94, (2) 34 R. R. 477 (10 B. & C. 446).
2 Tyr. 93).

WILLIAMS PATTESON, J.:

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It is one entire contract, and not two distinct contracts. It is a sale on the terms that the mare and part of the price should be returned in a certain event. If, indeed, the defendant had agreed to sell to the plaintiff the foal, the case might have been different. In *Watts v. Friend* (1) the bargain was to sell to the plaintiff an entirely different thing, and not merely to *return to him the same article. *Wood v. Benson* (2) shows only that there may be two contracts on one piece of paper, of which one may be bad, the other good.

[*503]

WILLIAMS, J. concurred.

Rule discharged.

1839.
June 7.

SUSANNA HOLMES *v.* WILSON AND TWO OTHERS (3).

(10 Adol. & Ellis, 503—511.)

[503]

Trespass is the proper remedy for wrongfully continuing a building on plaintiff's land, for the erection of which plaintiff has already recovered compensation; and a recovery, with satisfaction, for erecting it, does not operate as a purchase of the right to continue the erection.

Therefore, where the trustees of a turnpike road built buttresses to support it on the land of A., and A. thereupon sued them and their workmen in trespass for the erection, and accepted money paid into Court in full satisfaction of the trespass: Held, that, after notice to defendants to remove the buttresses, and a refusal to do so, A. might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar.

TRESPASS for breaking and entering five closes of plaintiff, with force and arms, and, without leave and licence of plaintiff, keeping and continuing in and upon the said closes ten erections called buttresses, theretofore without the leave and licence of plaintiff erected by defendants in and upon the said closes, and thereby encumbering the said closes, and preventing plaintiff from having the use and enjoyment thereof.

Plea 1. Not guilty. 2. That plaintiff heretofore, to wit on &c., in the Court of King's Bench at Westminster, impleaded defendants in an action of trespass, and declared against said defendants in that action for committing the very same trespasses in the declaration in this present suit above mentioned: whereupon defendants then pleaded that plaintiff ought not further to maintain her action,

(1) 34 R. R. 477 (10 B. & C. 446).

(3) *Bowyer v. Cook* (1847) 4 C. B.

(2) 37 R. R. 635 (2 Cr. & J. 94, 236, 16 L. J. C. P. 177.
2 Tyr. 93).

because defendants then brought *into Court the sum of 25*l.*, ready to be paid to plaintiff, and that plaintiff had not sustained damages to a greater amount, &c: that defendants then paid the said sum into Court: and that plaintiff afterwards took the same out of Court, and taxed her costs in that action: that defendants then paid the said costs; and plaintiff accepted the said sum, with the costs, in full satisfaction of the causes of action in the said action of trespass complained of, and of all damages and costs occasioned thereby, and proceeded no further in that action. Averment of the identity of the trespasses in the two actions, and verification.

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WILSON.
[*504]

To this last plea the plaintiff newly assigned that she brought her action for other and different trespasses than those complained of in the former action. Plea to the new assignment, Not guilty.

On the trial at the Yorkshire Summer Assizes, 1897, before Parke, B., it appeared that the plaintiff was the owner and occupier of lands, through which a road had been made under the powers of stat. 4 & 5 Will. IV. c. xxxii. (local and personal, public) (1), which prescribes the line of the road and provides that no deviation shall be made in the lands of the plaintiff more to the north than the prescribed line. The defendants (of whom one was a trustee under the Act, and the others a contractor and his foreman) raised an embankment, supported by a wall, on that part of the line which passed through the plaintiff's land. The trustees considering it necessary to *give further support to the embankment, the defendants, for this purpose, erected certain buttresses upon the north side of the wall and of the prescribed line, and upon the closes named in the declaration. This was done without the plaintiff's consent; and it was admitted to be contrary to the provision in the Act, which protected her land from further deviation on this side.

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The plaintiff thereupon commenced an action of trespass against the three present defendants, together with two others not named in this action. The declaration in that action complained of breaking and entering the same five closes, digging up the earth, damaging the herbage, encumbering the soil with bricks, mortar, &c., and erecting thereon the buttresses, and keeping and continuing the said bricks, mortar, &c., so placed thereon, and the buttresses so erected, for a long space of time, to wit &c. The defendants paid

(1) Entitled, "An Act for repairing and maintaining the road from Quebec in the parish of Leeds in the West Riding of the county of York, to Homefield Lane End in the same

parish, with a bridge or bridges on the line of such road; and for making and maintaining certain branch roads to communicate therewith."

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25l. into Court, which the plaintiff accepted in satisfaction. The proceedings in this former action were the subject of the plea in the present one.

The former action was brought immediately after the erection of the buttresses, on a writ issued 7th December, 1836.

On the 3rd February, 1837, the money was accepted by the plaintiff in satisfaction.

On 9th of May, 1837, judgment was entered for the plaintiff.

[*506]

On 13th February, 1837, the plaintiff caused a notice to be served on defendants, requiring them, within twelve days, to remove the buttresses erected upon her land, and giving notice that, if they did not do so, an action would be brought for continuing the buttresses on the land, and further actions from time to time until compliance with the requisition. The trustees, considering that the buttresses were necessary to support the road, and that the former payment by them was an equivalent for the permanent use of the land, refused to remove them. On 27th April following, the present action was commenced. It was not shown that the defendants, or any of them, had entered upon the land of the plaintiff, or had done any act upon it since the trespasses complained of in the first action (1). One of them (the contractor) had entered into an agreement with another of the defendants (the trustee) in 1836 to keep the road in repair for two years. On the part of the defendants it was contended that the action was improperly conceived in trespass; that, by force of the local Act and of the General Turnpike Act, 3 Geo. IV. c. 126, s. 147, the plaintiff was barred of her action after three months from the date of the original trespass; and that the damages recovered in the former action were to be regarded as a full compensation for all injury occasioned by the buttresses, or as a "satisfaction out and out." The learned Baron nonsuited the plaintiff, reserving liberty to move to enter a verdict for her with nominal damages.

In Michaelmas Term, 1837, *Starkie* obtained a rule *nisi* according to the leave reserved.

Alexander now showed cause :

The proper form of action, if any will lie, is case, and not trespass.

(1) Upon showing cause against the rule *nisi* in this case, it was alleged by the plaintiff's counsel that such evidence had been given; but *PARKE*, B., being referred to by this Court, stated

that he had no recollection of such evidence, and that the only question, on the trial, was, whether the action lay for continuing the buttresses.

In **Lawrence v. Obee* (1) Lord ELLENBOROUGH was of that opinion, and there is no authority to show that a mere continuance is a trespass. Still less is such continuance a trespass, where the act complained of was originally done in pursuance of an Act of Parliament. The General Turnpike Act, 3 Geo. IV. c. 126, s. 147 (which extends to all local Acts for making, &c., turnpike roads, sect. 4), limits suits "for any thing done in pursuance of the Act" to "three months after the fact committed," and provides that the defendant may give the special matter in evidence on the general issue. Here the buttresses were erected more than three months before the commencement of this action; and it would defeat the object of the Act, if fresh actions could be brought for a mere continuance. In *Wordsworth v. Harley* (2) the defendant, as surveyor of highways, had added part of the plaintiff's land to the highway, and separated it from the rest by building a wall between the rest of the land and the road. After the lapse of three months the plaintiff sued defendant for building the wall, and thereby separating part of his close from the rest, and for "keeping and continuing" it so separated. It appeared that the wall was built, and the separation completed, more than three months before action brought; but the wall had been raised and finished within that period. It was held that the defendant was protected by the limitation clause in the General Highway Act. *Lord Oakley v. The Kensington Canal Company* (3) is also in point. *Smith v. Shaw* (4) also shows that interference *by giving improper directions for the doing of any thing supposed to be in execution of the provisions of the statute, is a "thing done in pursuance of the Act." But, at all events, the former recovery is a complete bar; the damages given on the first action must be considered as the full estimated value of the land thus permanently occupied by the buttresses. The damages were in respect of prospective as well as past injury; the judgment operated as a purchase of the land.

(LORD DENMAN, Ch. J.: If the property was changed, why did you not put in a plea to that effect?)

It was needless to raise that question. The plea states a fact, which either shows a transfer of the property, or, at all events, precludes any further action for a trespass upon it.

(1) 1 Stark. 22.

(2) 1 B. & Ad. 391.

(3) 5 B. & Ad. 138.

(4) 10 B. & C. 277.

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(PATTESON, J. : How can you convert the recovery, and payment of damages for the trespass, into a purchase? A recovery of damages for a nuisance to land will not prevent another action for continuing it.)

No act is shown to have been done since the former recovery. The defendants have no right to enter the plaintiff's land, without her leave, in order to remove the nuisance; so that, unless the plaintiff removes it herself, the defendants will be exposed to continual actions, or be obliged to commit a further trespass by entering to remove it.

Starkie and Crompton, contra :

The action lies, and is in the proper form. Every continuation of an original trespass is a fresh one.

(LITLEDALE, J. : If the defendant throws a heap of stones on the plaintiff's close, and there leaves them, will trespass lie from day to day, till they are removed?)

[*509]

"The continuing of a *trespass from day to day, is considered in law a several trespass on each day;" note (1) to *Earl of Manchester v. Vale* (1). The Court of Exchequer have recently decided this point in *Hudson v. Nicholson* (2); where it was held that a count for keeping and continuing timbers, which had been placed on the plaintiff's close before he became possessed of it, was a count in trespass, and not case; and the case was there likened to that of a defendant who persists in holding out a pole into his neighbour's land, and who would be liable in trespass as long as he continued to do so. *Rosewell v. Prior* (3) is similar to the present case, except that it was an action on the case for a nuisance. There an action for continuing a nuisance to the plaintiff's lights was held to lie after a recovery for the erection of it. As to the supposed effect of the judgment in changing the property of the land, the consequence of that doctrine would be, that a person, who wants his neighbour's land, might always buy it against his will, paying only

(1) Wms. Saund. 24, citing *Monckton v. Pashley*, 2 Id. Ray. 976.

(2) Since reported in 5 M. & W. 437; but the illustration, as there reported (p. 446), differs from that mentioned in the present argument.

See also the judgment of LE BLANC and BAYLEY, JJ. in *Winterbourne v. Morgan*, 10 R. R. 532 (11 East, 395).

(3) 2 Salk. 460. See also *Johnson v. Long*, 1 Salk. 10; *Rex v. Peddy*, 40 R. R. 444 (1 Ad. & El. 822).

such purchase-money as a jury may assess for damages up to the time of the action. If the property was changed, when did it pass? Suppose the plaintiff had brought ejectment for the part occupied by the defendant's buttresses, would the recovery of damages in trespass be a defence? There is no case to show that, when land is vested in a party, and fresh injuries are done upon it, fresh actions will *not lie. Then, as to the powers of the local Act and the limitation in the General Turnpike Act, the case is clearly not within either of them; for the local Act expressly forbids any deviation to the north of a certain line, and the trustees wilfully directed the buttresses to be built on the ground beyond the line, in order to support their own defective works within it. But, even if the defendants are to have the benefit of the Act, an action will lie for a continuing injury. *Roberts v. Read* (1) shows that the time runs from the date of the injury complained of, though trespass may lie for the act done. In *Wordsworth v. Harley* (2) the action was by a reversioner, whose cause of action was complete on the first erection of the wall, and not by an occupier for a continued trespass.

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(PATTESON, J.: It is there remarked by BAYLEY, J. that a continuation is not a new fact committed, within the statute. Indeed, if it were so, the Act would be nugatory. You might bring an action at any time, whether there had, or had not, been a previous recovery.)

The distinction is between an action for damage consequential upon an injury for which the plaintiff has already recovered a judgment, as in *Fetter v. Beale* (3), and an action for a continuing injury repeated *de die in diem*, in which the plaintiff can only recover damages up to the issuing of the writ.

LORD DENMAN, Ch. J.:

The defendants are clearly not within the protection of either statute (4). Then, the *former and the present action are for different trespasses. The former was for erecting the buttresses.

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(1) 14 B. R. 335 (16 East, 215).

(2) 1 B. & Ad. 391.

(3) 1 Salk. 11.

(4) It did not appear that the Court assumed the original act to have been

done *bonâ fide* with the intent of carrying the statute into effect: and the decision upon the limitation clause is therefore not noticed in the headnote.

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This action is for continuing the buttresses so erected. The continued use of the buttresses for the support of the road, under such circumstances, was a fresh trespass.

LITTLEDALE, PATTESON, and WILLIAMS, JJ. concurred.

Rule absolute to enter a verdict for the plaintiff (1).

1839.

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REG. v. DAVID JONES (2).

(10 Adol. & Ellis, 576—582.)

The surrogate of the Bishop's official principal is not the proper party to signify the contumacy of a defendant in a suit before him as Judge of the Consistory Court; and this both before and after 53 Geo. III. c. 127: and, where defendant is taken under a *contumace capiendo* issued upon such a certificate, this Court will discharge him out of custody.

CHILTON, in Easter Term last, obtained a rule to show cause why the writ of *contumace capiendo*, issued in this case, should not be set aside for irregularity, with costs, and the defendant be discharged out of custody under the writ, and the prosecutor pay the costs of the application. The grounds of the application were, that the excommunication was certified by a surrogate only, and not by the Vicar General himself, or in the name of the Bishop, and that the certificate did not sufficiently set forth the cause of the commitment, or show the jurisdiction of the Ecclesiastical Court.

There were also affidavits on both sides upon the merits; but

(1) By a recovery in trespass for taking, or trover for converting, personal chattels, followed by satisfaction, the property is altered, and vests in the defendant; for "*solutio pretii emptoris loco habetur*": Jenk. Cent. p. 189 (Cent. 4, ca. 88); Keilw. 58 b; *Adams v. Broughton*, 2 Stra. 1078. But it is otherwise where the damages were not estimated on the footing of the full value; and this, it seems, may be shown in a replication to the plea of the former recovery: *Lacon v. Barnard*, Cro. Car. 35. See also *Field v. Jellicus*, 3 Lev. 124, and the judgment of HOLROYD, J. in *Morris v. Robinson*, 27 R. B. 322 (3 B. & C. 206).

Quære, whether the plaintiff, in the principal case, might not have recovered damages in respect of the expense of removing the buttresses herself; and the effect of such recovery? [This note of the learned reporter is referred to in the argument, and in the judgment of WILLES, J., in *Brinsmead v. Harrison* (1871) L. R. 6 C. P. 584, 590, 40 L. J. C. P. 281, 285, *affd.* Ex. Ch. L. R. 7 C. P. 547, 41 L. J. C. P. 190.—R. C.]

(2) Referred to by MANISTY, J. in *Dale's case* (1881) 6 Q. B. D. 376, 416, 50 L. J. Q. B. 234, 255.—R. C.

they were not discussed, the objection turning wholly on the form of the writ. In last Trinity Term (1),

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JONES.

(1) Wednesday, May 22nd. Before Lord Denman, Ch. J., Littledale, Patteson, and Williams, JJ.

The following is a copy of the writ *de contumace capiendo*, reciting the certificate of the ecclesiastical Judge.

Victoria, by the grace of God, &c. to the sheriff of Carmarthenshire, greeting. David Archard Williams, clerk, surrogate and representative of Augustus Pechell, Esquire, Master of Arts, Vicar General and principal official of the Right Reverend Father in God John Banks, by divine permission Lord Bishop of Saint David's, lawfully constituted and appointed the sole Judge of the Ecclesiastical and Consistory Court in Carmarthen, in and for the diocese of Saint David's aforesaid, hath signified to us that one David Jones of Placenewydd in the parish of Llannon in the county of Carmarthen and diocese aforesaid, husbandman, is manifestly contumacious, and contemns the jurisdiction and authority of the law and jurisdiction ecclesiastical, in not obeying the lawful commands of the said D. A. Williams, the Judge of the said Court, to pay or cause to be paid to *the Reverend Ebenezer Morris, clerk, curate, and incumbent of the parish and parish church of Llannon in the county and diocese aforesaid, or to J. Williams his proctor, the sum of 35*l.* 11*s.* 4*d.*, the amount of costs on his the said E. Morris's behalf, duly taxed in a certain cause of the office of Judge, lately depending before the said D. A. Williams, the surrogate and representative of the said A. Pechell as aforesaid, in judgment in the said Court held at Carmarthen, and still remaining, wherein the said E. Morris is the party agent and promvent, of the one part, and the said D. Jones is the party respondent accused and complained of, of the other part, in not obeying the lawful commands of the said D. A. Williams, the Judge of the said Court, as herein

is described and set forth, to pay or cause to be paid to the said E. Morris, or to his said proctor the said J. Williams, the said sum of 35*l.* 11*s.* 4*d.* the costs aforesaid, and to pay to the said E. Morris, or to his proctor the said J. Williams, the further sum of 3*l.* 2*s.* 8*d.* the taxed costs of a monition and of executing the same monition upon the said D. Jones, and by reason of his manifest contempt and contumacy in not appearing before the said D. A. Williams the Judge of the said Court, lawfully authorised and constituted as herein mentioned, and set forth on a certain competent day, hour, and place, now long past, in the cause or matter aforesaid, which is a cause of the office of Judge at the promotion of the said E. Morris against the said D. Jones, for divers alleged neglects or omissions of several of the ecclesiastical duties of the said D. Jones in his office of churchwarden of the said parish of Llannon, in the county and diocese aforesaid for the time being, and which said office of churchwarden of the said parish of Llannon, in the county and diocese aforesaid, he the said D. Jones had duly accepted and taken upon himself for the time being; and particularly for his having as such churchwarden (here the writ set forth his wilful absence from, and refusal to attend at, the parish church of the said parish during the performance of divine worship on several Sundays, to see that due order was kept therein, and his refusal, when required, to provide sufficient sacramental bread and wine, having at the time sufficient or ample means in his hands, or in his power, for that purpose; and also his contempt in not attending before the said Judge pursuant to a monition duly issued and served on him, and contumaciously refusing to obey the lawful commands of the said Judge and to pay the said costs). Therefore he the said D. A. Williams, lawfully authorised as the

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E. V. Williams showed cause :

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Stat. 53 Geo. III. c. 127, s. 1, provides that, in causes cognizable in the Ecclesiastical Court, when any person disobeys a lawful *decree, the Judge or Judges who issued out the citation, or whose lawful decree is not obeyed, may pronounce such person to be contumacious and in contempt, and, within ten days, signify the same in form annexed to the Act, to his Majesty in Chancery, as heretofore done in signifying excommunications; and thereupon a writ *de contumace capiendo*, in the form annexed, shall issue from the Court of Chancery, and all rules and regulations, not altered by that Act, applying to the writ of *excommunicato capiendo*, are made to extend to the writ *de contumace capiendo*. The blank form in the schedule (A.) may be relied upon as showing that the *significavit* must be by a higher officer than a surrogate. It uses the plural form, “we hereby notify and signify” &c., and the words “by divine Providence.” But the latter words apply only to an Archbishop; so that any argument drawn from the use of them would exclude a Bishop, or the court of delegates. With respect to the plural form, it appears from *Prankard v. Deacle* (1) *that an archdeacon, and even the surrogate of a vicar-general, are in the practice of assuming it; and that a surrogate is, for some purposes, a Judge in criminal suits. The form given is only by way of example, and must be fitted to circumstances. It speaks of the “ecclesiastical Judge, or his representative.” Here the surrogate is the Judge whose decree is contemned, and who is therefore the party to signify. There is an *obitèr* observation of the Court in

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Judge of the said Court, did in open Court decree and pronounce the said D. Jones, for the causes aforesaid, to be contumacious and in contempt, and the said D. Jones is therefore contumacious and in *contempt; and he the said D. A. Williams, the sole Judge of the said Court, as herein mentioned and set forth, being within ten days after such his decree being pronounced as aforesaid (*sic*); nor will he submit to the ecclesiastical jurisdiction; but, forasmuch as the royal power ought not to be wanting to enforce such jurisdiction, we command you, that you attach the said D. Jones by his body until he shall have made satisfaction for the said contempt; and how you shall execute

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this our precept notify unto us on the 11th January next, wheresoever we shall then be in England, and in no wise omit this: and have you there this writ. Witness ourselves at Westminster the 26th November, in the 2nd year of our reign.—BENTALL.

The writ was allowed, inrolled, and delivered of record in this Court in Michaelmas Term, 2 Vict.

A return of *cepi corpus* was endorsed by the sheriff in the same Term; but it had not been filed at the time of making the above motion.

(1) 1 Hag. Ecc. Rep. 169, 190. See certificates by a commissary, and by a mayor of London, in the same plural form, in *Madox's Formulæ*, pp. 19 and 20.

Rex v. Ricketts (1), that the Judge is to convey the information only as the instrument of the Archbishop; but the practice is contrary to this; and the writ in that case was not objected to, though it ran in the name of the official principal. If it be urged that the officer was here the mere deputy of a deputy, the answer is that such deputations are of constant occurrence, and of recognised validity in the spiritual Courts. The 128th of the canons of 1603 (2) regulates the appointment of judicial deputies, and prescribes their qualifications. In *Prankard v. Deacle* (3) Sir JOHN NICHOLL speaks of the "surrogate, or other competent Judge." With respect to the statement of the cause in the Court below, enough appears to show that it was one within its cognizance.

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JONES.

Chilton, contra :

The cause is not sufficiently stated; but at all events the *significavit* is by the wrong party. The contumacy is to be signified (stat. 53 Geo. III. c. 127, s. 1) "as hath been heretofore done in signifying excommunications;" and all rules, applicable to writs of *excommunicato *capiendo*, are extended to the new writs. Now excommunication was always certified by the Bishop. In Co. Litt. 134 a it is said that none can certify *excommengement* but the Bishop, or one that has ordinary jurisdiction; and a passage from Year B. Pasch. 11 Hen. IV., 64 A. pl. 16, is referred to, in which it is said that formerly every official or commissary of the Bishop might testify excommunication, till it was ordained by Parliament that none but the Bishop should do so.

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(PATTESON, J. : Can you find any such Act of Parliament ? (4).)

(1) 6 Ad. & El. 537, 541.

(2) Gibson's Codex, tit. xliii. cap. 3 (vol. ii. p. 991, 2nd ed.).

(3) 1 Hag. Ecc. Rep. 169, 190.

(4) The words of HANKFORD (then puisne Judge of C. P., afterwards Ch. J. of K. B.) in the passage in Year B. Hen. IV. are as follows: "J'ay trove en mes livres en temps Sir Will' Herle, qu'en ascun temps chescun official et commissary d' evesque purra tesmoigner un excommengement en Court le Roy, et per le mischiefe que ensuit d' icel, il fuit avise en parlement, que nul duist tesmoigner excommengement, mes solement

l'evesque, et cest ley est uncore use," &c. The name of Herle, either as counsel or Judge, occurs throughout the reign of Edw. II., and during a part of that of Edw. III. until 1336 (9 Edw. III.), when, according to Dugdale, he received his *quietus*. In all the cases upon certificates of excommunication during that period, which the reporters have been able to find in the Year Books and in Fitzherbert's Abridgement, the Bishop or Archbishop appears to have certified; nor is there any suggestion in them of a change of practice. Fleta, lib. vi. c. 38, s. 2, speaks of the ordinary as

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None. In Year B. Tr. 7 Edw. IV., 14 A. pl. 6, it is laid down that the commissary may certify, but it must be in the name of the Bishop. The Chancellor of Oxford or Cambridge Universities may certify (1); but the Vice-Chancellor cannot, except in the *name of the Chancellor. The rule is, that none can certify but those to whom this Court can write, if necessary; and this Court can only write to the ordinary: *Trollop's* case (2). The Bishop alone is the Judge meant by the statute. But if the Vicar General be, as he is represented in the writ to be, the "sole Judge," then the surrogate, who styles himself only the representative of the Judge, cannot be a proper person to signify under the Act. A surrogate is one "substituted or appointed in the room of another:" Cowel's Law Dictionary, v. Surrogate: and the rule "*delegatus non potest delegare*" applies; for he is only the substitute of a deputy, namely, of a vicar general and official principal. In *Rex v. Ricketts* it was unnecessary to consider whether the writ was objectionable on this ground; but the *significavit* was there by a Judge who united the offices of dean of the arches and official principal, which are always held by the same person.

(LITLEDAL, J.: It is said in Com. Dig. Excommengement, (B 2) (3), that the certificate of the contempt ought to be by the ordinary by his letters under seal.)

If, then, the *significavit* is irregular, the *capias* founded on it must be bad, and the party entitled to his discharge.

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Vacation (June 21st) delivered the judgment of the COURT:

His Lordship stated that, upon referring to the authorities, it appeared that the writ could not properly be issued upon the certificate of a surrogate in his own name. That such certificate [*582] was irregular before the statute 53 Geo. III. *c. 127, and that there

the proper person. Bracton, lib. v. cap. 23, s. 3, says that an excommunicate may be taken, "*ad mandatum episcopi vel ejus officialis*," but not on the mandate of a Judge delegate, archdeacon, or other inferior Judge, "*quia rex in episcopos coercionem habet propter baroniam*." But he seems to make a distinction between certificates for the purpose of taking

the party, and for the purpose of supporting a plea in abatement. See *ib.* sect. 1. And see further Regist. Brev. 65; F. N. B. 65; Lyndw. Provin. pp. 127, verb. *Brachium seculare*; 350, verb. *Prælatorum*, ed. 1779.

(1) *Trollop's* case, 8 Co. Rep. 68 b.

(2) 8 Co. Rep. 68 a.

(3) Referring to *Rex v. Fowler*, 1 Salk. 293.

was nothing in that statute showing the intention of the Legislature to alter the practice in this respect. The defendant was to have his costs, upon undertaking not to bring any action (1).

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r.
JONES.

Rule absolute to discharge defendant out of custody as to his commitment by virtue of the writ de contumace capiendo.

CANN v. CLIPPERTON.

(10 Adol. & Ellis, 582—589; S. C. 2 P. & D. 560; 8 L. J. (N. S.) Q. B. 268.)

1839.
June 13.
[582]

Where a statutory protection is given to persons having acted in pursuance of the statute, a party is not entitled to the protection merely because he believed, *bonâ fide*, that he was so acting. There must be reasonable ground for the belief.

If the party acted under a reasonable, though mistaken, persuasion, from appearances, that the facts were such as made his proceeding justifiable by the statute, he is entitled to protection, though the real facts were such that the statute clearly affords no justification.

Thus, if, by the assumed authority of 7 & 8 Geo. IV. c. 30, s. 28 (2), which gives power to arrest persons found committing certain offences, a party has arrested another as being so found, under circumstances which afforded reason for thinking that he was, at the time, committing an offence within the Act, though in reality he was not, and an action is brought for the arrest, the defendant is entitled to notice of action under sect. 41.

TRESPASS for assaulting plaintiff, forcing him to go to the Justice-room at the Mansion House in and of the city of London, and falsely imprisoning him, &c. Plea, Not guilty. On the trial before Lord Denman, Ch. J., at the sittings in London after Hilary Term, 1838, the following facts appeared.

William Wilman was the landlord of a house in Sun Street, Bishopsgate, of which, at the time in question, one Horswell claimed to be tenant, but Wilman disputed the tenancy. In November, 1837, no one being on the premises, Wilman sent in workmen to do repairs. On November 21st (the day before the alleged trespass), Horswell's wife, with the plaintiff, who was her brother-in-law, *and others, went to the house, and forcibly took possession. Wilman, during the day, endeavoured to repossess himself of the premises, but was driven off. Mrs. Horswell's party remained in the house, and, in the latter part of the day, took out

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(1) The defendant elected to take his rule without costs; but no action was ever brought by him. Further proceedings were taken in the Ecclesiastical Court; but they were stopped

by the death of the defendant.

(2) See now the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 61.—R. C.

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the windows, one of which they shattered. Hall, a policeman, saw the damage going on, and the plaintiff and Mrs. Horswell (as he judged by their gestures) giving directions. Wilman, before he was driven away, desired Hall to take the parties into custody; but he refused. Mrs. Horswell's party remained on the premises during the night. They made a fire on one of the hearths, and suffered the fire to catch the rafters of the house. In the morning, about eight o'clock, Hall, the policeman, went into the house and found it on fire. The plaintiff was not there; but the policeman sent to the plaintiff's house in Holborn for him. He came about half-past ten; and some conversation passed between him and the policeman respecting the fire. The defendant, who was a solicitor, and acted on behalf of Wilman, came to the house between ten and eleven; the policeman was then walking up and down the street; the plaintiff was still on the premises, and other persons going in and out. No mischief was being done at that time. The defendant asked the policeman why he did not take the plaintiff into custody, and directed him to do so. The policeman apprehended the plaintiff, and the parties went to the Mansion House, where a charge was preferred against the plaintiff under stat. 7 & 8 Geo. IV. c. 30, "for consolidating and amending the Laws in England relative to malicious Injuries to Property." The charge was dismissed. On proof of these facts, the defendant's counsel urged that the plaintiff must be nonsuited; that the defendant had clearly proceeded on stat. 7 & 8 Geo. IV. c. 30, s. 28, which enacts, "that any person found committing any offence against this Act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law:" and that no notice of action had been given in this case, whereas sect. 41 of the same Act provides, "for the protection of persons acting in the execution of this Act," that in "all actions and prosecutions to be commenced against any person for any thing done in pursuance of this Act," "notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action" (1). The LORD CHIEF JUSTICE refused to nonsuit, but reserved leave to move that a nonsuit might be entered: and he left it to the jury

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(1) See note (4), p. 506 below.

to say whether the defendant had acted *bonâ fide*, and under a belief that his proceeding was warranted by the statute; whether he, at the time of giving the plaintiff into custody, acted as Wilman's servant; and whether, at that time, the plaintiff was "found committing" an offence against the statute. The jury found that the defendant acted *bonâ fide*, and as servant to Wilman; but that the plaintiff was not, at the time in question, found committing an offence against the statute. Verdict for the plaintiff with one shilling damages. *Kelly*, in Easter Term, 1838, obtained a rule *nisi* for entering a nonsuit, or verdict for the defendant. He cited *Beechey v. Sides* (1) and *Ballinger v. Ferris* (2).

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Platt and Fish now showed cause :

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It was decided by the jury, and is clear from the evidence, that the plaintiff, when taken into custody, was not found committing any offence against the Act. The being so found is essential to the right of apprehending summarily under stat. 7 & 8 Geo. IV. c. 30, s. 28, which differs in this respect from the stat. 1 Geo. IV. c. 56, s. 3, against wilful trespassers, where such right was given in the case of any person who should "have actually committed, or be in the act of committing, any offence" there specified. It is said that the defendant is nevertheless protected, because he thought he was acting under the statute in causing the plaintiff to be arrested. But the belief, to furnish such a defence, must be a reasonable belief; here it was quite unfounded. The defendant was an attorney, and might be expected to know the law. In *Beechey v. Sides* (1) there was a clear case of trespass by the party arrested; the circumstances were such as might lead a man of ordinary discretion to think that he was acting under the statute; *bona fides* was the only question. BAYLEY, J., said, "Where the facts are such that a party may be considered as having any fair colour for supposing that he is warranted by the Act of Parliament in doing that which is made the subject of an action, he is entitled to notice." Here no such colour appeared. In *Ballinger v. Ferris* (2) the defendant's character of a public officer was taken into consideration; the party apprehended had, in fact, committed a forcible injury just before the arrest; and it was made for that. Lord ABINGER, C. B., there observed that the provisions of stat. 7 & 8 Geo. IV. c. 30, s. 41 (3),

(1) 33 B. R. 333 (9 B. & C. 806).

(2) 1 M. & W. 628, Tyr. & G. 920.

(3) See now the Public Authorities

Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.—R. C.

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as to notice, would be useless *if they did not extend to cases where the party claiming notice might be unable to justify the conduct complained of; that remark applies where the proceeding has been a mere slip, but not where it is so manifestly without reason as in this case. BAYLEY, J., in *Cook v. Leonard* (1), states the general rule thus: "Where an Act of Parliament requires notice before action brought in respect of any thing done in pursuance or in execution of its provisions, those latter words are not confined to acts done strictly in pursuance of the Act of Parliament, but extend to all acts done *bonâ fide* which may reasonably be supposed to be done in pursuance of the Act. But where there is no colour for supposing that the act done is authorised, then notice of action is not necessary." This case falls within the latter part of the rule. It is, indeed, found that the defendant acted *bonâ fide*; but, as was pointed out by PATTESON and COLERIDGE, JJ., in *Wedge v. Berkeley* (2), *bona fides* and reasonable cause are two distinct questions in such a case: the finding of *bona fides* negatives any imputation of malice; but the party is not protected if he acted without reasonable cause.

Kelly, contra :

The defendant's mistake has consisted in overlooking the distinction, noticed on the other side, between stat. 7 & 8 Geo. IV. c. 30, s. 28 (3), and stat. 1 Geo. IV. c. 56, s. 3. On the 21st November it would clearly have been lawful for him, as Wilman's servant, to apprehend the plaintiff while the windows were being pulled out and destroyed under his direction. On the following day, when the defendant arrived, no damage *was actually being committed; but there was recent mischief, and the plaintiff was on the premises. Then the defendant, as servant to Wilman, and acting *bonâ fide* (both which facts are found by the jury), gave the plaintiff into custody. Such a case is within the protection of stat. 7 & 8 Geo. IV. c. 30, s. 41 (4). It is laid down as the law, in *Beechey v. Sides* (5), that, where a defendant has really believed himself justified by statute in doing the act complained of, this section applies. In *Cook v. Leonard* (1) it was evidently the opinion

(1) 30 R. R. 348 (6 B. & C. 350).

(2) 45 R. R. 583 (6 Ad. & EL. 663).

(3) Substantially the same as section 61 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97).—R. C.

(4) See now the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1.—R. C.

(5) 33 R. R. 333 (9 B. & C. 806).

of the Court, and of BAYLEY, J. in particular, that the defendant could not *bonâ fide* have believed himself acting under legal authority. That case was relied upon in *Wright v. Wales* (1); and there the question considered by all the Judges was, in effect, whether it fairly resulted from the facts that the defendant considered himself justified. In *Cook v. Leonard* (2) BAYLEY, J. held (p. 355, 6) that notice is unnecessary only "where there was no colour for supposing the act to be authorised, and that a party is protected if he had reasonable grounds for thinking that a statute gave him the authority which he has used." That the belief was simply erroneous is no ground for denying the protection; if it were, sect. 41 would be useless. It was said by Lord ABINGER, C. B. in *Ballinger v. Ferris* (3), "We should take away the protection given by the statute, if we were to say that where there is a doubt as to the authority of the party, but none as to his motives, he should not have the opportunity which the Legislature designed to give him, of tendering amends. The very purpose for which the Act gives him that *opportunity supposes him unable to justify the facts; he requires notice that he may tender amends." So PARK, J. said, in *Wright v. Wales* (1), "If he" (the defendant) "had been acting legally, he would not have wanted the protection afforded by the notice." (*Crowder*, on the same side, was stopped by the COURT.)

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LORD DENMAN, Ch. J. :

The case of justification was a little short on the facts. Wilman had been at the house on the 21st of November, and seen the plaintiff there, under circumstances which seemed to show that he was encouraging the mischief then proceeding. A fire takes place during the night: on the following morning the defendant comes to the premises: he sees the same course of mischief apparently going on, a recent conflagration, and the plaintiff on the premises. Then he says to the police officer, "Why do you not take him into custody?" The defendant seems not merely to have had that impression which was suggested, as to the law, but to have thought that the mischief was actually going on at the time. Else I am unwilling to say that, if a party acts *bonâ fide* as in execution of a statute, he is justified at all events, merely because he thinks he is doing what the statute authorises, if he has not some ground

(1) 30 R. R. 622 (5 Bing. 336).

(3) 1 M. & W. 628, Tyr. & G. 920.

(2) 30 R. R. 348 (6 B. & C. 350).

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in reason to connect his own act with the statutory provision. The doctrine attributed to BAYLEY, J. goes too far. But here the defendant might reasonably think that, in point of fact, the circumstances were those to which the protection of stat. 7 & 8 Geo. IV. c. 30, s. 41, attaches. The rule for a nonsuit must therefore be absolute.

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LITLEDALE, J. :

I am of the same opinion. Mere *bona fides* is not sufficient ; for a man may be very foolish in believing himself justified. But here the defendant had reason to think that the mischief was going on when he ordered the plaintiff to be apprehended ; therefore notice ought to have been given.

PATTESON, J. :

Perhaps none of the cases differ in principle from the decision we are now coming to : but single expressions are sometimes laid hold of, and too much insisted upon. It is not because a man chooses to think himself acting under a statute, that he can, by such mere fancy of his own, protect himself in an action. But here the defendant had some ground for thinking that he was really in the situation which justified his proceeding.

WILLIAMS, J. :

I am of the same opinion. It would be wild work if a party might give himself protection by merely saying that he believed himself acting in pursuance of a statute ; for no one can say what may possibly come into an individual's mind on such a subject. Still, protecting clauses, like that before us, would be useless if it were necessary that the person claiming their benefit should have acted quite rightly. The case to which they refer must lie between a mere foolish imagination and a perfect observance of the statute. Here the defendant might with some reason believe that the facts were such as would entitle him to protection.

Rule absolute for entering a nonsuit (1).

(1) See *Wells v. Ody*, 2 Cr. M. & R. 128, 5 Tyr. 725 ; *Hopkins v. Crowe*, 43 R. R. 475 (4 Ad. & El. 774) ; *Reed v. Cowmeadow*, 45 R. R. 580 (6 Ad. & El. 661) ; *Lidster v. Borrow*, 9 Ad. & El. 654.

STURGE v. BUCHANAN.

(10 Adol. & Ellis, 598—606; S. C. 2 P. & D. 573; 8 L. J. (N. S.) Q. B. 272;
S. C. at Nisi Prius, 2 Moo. & Rob. 90.)

1839.
June 15.
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Plaintiff gave defendant notice to produce certain specified letters written by defendant to his partner, and a letter-book kept by him, containing copies of the above letters; and defendant consented to admit copies of the letters, saving just exceptions, &c., and undertook to produce the letter-book in proof of them.

Held, first, that the book, when produced by defendant, was good secondary evidence against him of the letters specified in the notice; secondly, that, supposing proof of the sending of the letters to be material, the fact of their being transcribed in such a book was evidence of it as against defendant; thirdly, that defendant had no right to read, in his own behalf, other letters upon the same subject, copied in the same book, but not referred to in those read by the plaintiff.

Held also, that, although the above letters were written to a partner resident in New South Wales, yet, as there had been proceedings in Chancery between the same parties on the subject of the action six years before the trial, in the course of which the letters had been referred to, the Court would presume that they had been remitted to England, and that three days' notice to produce them was therefore sufficient.

Held also, that, the object of the evidence being to prove admissions by defendant, the transcripts in the book, made by defendant or by his authority, were alone sufficient for that purpose, without proving, or giving notice to produce, the originals.

ASSUMPSIT for goods sold, and on money counts. Pleas, *Non assumpsit*, and a Set-off. Upon the trial of the cause before Lord Denman, Ch. J., at the sittings in London after Hilary Term, 1838, it appeared that the action was brought to recover the value of a cargo of oil belonging to the plaintiff, and sold by the defendant to satisfy certain advances made by defendant's partner, Lamb, residing in New South Wales, to the captain of the vessel, for the alleged purpose of repairing and refitting it on its homeward voyage. Some of the disbursements, which the advances were intended to meet, did not come within the description of necessary repairs or expenses; but it was contended by the defendant that the plaintiff had ratified and adopted them by his subsequent conduct and dealings with the defendant. For the purpose of showing that defendant's partner had made the advances improperly, and that his acts had not, in fact, been recognized by the plaintiff, the plaintiff offered evidence of admissions contained in certain letters written by defendant to his partner in New South Wales, in 1831, of which plaintiff had obtained a knowledge by means of a bill in equity filed *by him against defendant and his partner, in December, 1831, on the subject of this suit. The present action was commenced in 1832. Before the trial, defendant was required, in the

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usual form, to admit, among other documents, certain "duplicates, copies, and extracts" described in the schedule of the notice as an "Extract from a Letter book kept by the defendant, No. 304, date 25th July, 1831; ditto, No. 313, date 1st September, 1831; ditto, No. 374, date 10th December, 1831," &c.; and that such duplicates, copies, or extracts, were true duplicates, copies, or extracts, and that the originals were respectively written, signed, dated, sent, delivered, and received as stated in the schedule, saving all just exceptions to the admissibility of the several documents as evidence, &c.

An order to admit was thereupon made by consent on 14th February, 1838; and the documents referred to were signed by the Judge and attorneys for the purpose of identifying them. The defendant's attorney also undertook to produce at the trial the "Letter book" referred to in the notice.

On the 16th February, four days before the trial, defendant was duly served with notice to produce certain specified letters written by him to his said partner, numbered and dated as in the above notice to admit; and also "the letter-book kept by the said defendant, containing the drafts, duplicates, or copies of the several letters above specified," &c., "and which letter-book you, the said" (defendant's attorney), "have given an undertaking in this cause to produce on the trial hereof."

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At the trial, the notice to produce the letters was objected to as too short, inasmuch as they must be presumed *to be in New South Wales. The LORD CHIEF JUSTICE over-ruled the objection, and admitted the letter-book (from which the extracts, referred to in the notice to admit, had been copied), as secondary evidence of the letters themselves. The book, which was indorsed "Lamb, Buchanan & Co.," purported to be copies of, or extracts from, the correspondence between the defendant and his partner Lamb. Three of these letters, purporting to be copies of letters written by the defendant Lamb, were read on the part of the plaintiff. The defendant then claimed a right to read to the jury several others contained in the same book; but his Lordship refused to permit any to be read on behalf of the defendant, except two which were expressly referred to in the letters read by the plaintiff. The jury found a verdict for the plaintiff.

In the following Easter Term, *Sir W. W. Follett* obtained a rule *nisi* for a new trial on the points taken at *Nisi Prius*, and also for misdirection. The latter ground of motion is here omitted.

Sir J. Campbell, Attorney-General, Sir F. Pollock, R. V. Richards, and Swann now showed cause (1):

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The notice to produce was sufficient under the circumstances. But, at all events, the entries made by the defendant's direction in a book kept by him are evidence as against him. The original letters might have been produced by the defendant; and, in their absence, the copies and extracts in the book are admitted to be true copies and extracts. The defendant objected to the admissibility *of the copies signed by the Judge, because he was willing to produce the book itself from which they were extracted; and, when produced, he insisted on reading the copies of all other letters transcribed in it. But the reading of one letter in it does not make another unconnected one evidence. It makes no difference that the letters happen to be bound together in a book. If they had happened to be upon the same file, it could not have been contended that all were made evidence; yet the case is not, in principle, different. Similar attempts have been made to put in evidence bundles of proceedings in bankruptcy, or all the entries in corporation books, merely because one paper or entry has been read by the opposite party; but they have always been rejected by the Court. *Catt v. Howard* (2) is exactly in point. There the defendant was not allowed to read distinct entries in his own day-book, though the plaintiff had read one of them against him. The same point has been ruled in the case of parol evidence of assertions made in the course of the same conversation: *Prince v. Samo* (3).

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Kelly and Wightman, contra :

The plaintiff unfairly seeks to avail himself of his knowledge of letters, obtained from the defendant's answer in Chancery, without reading the answer itself, the originals being in New South Wales in the possession of the party to whom they were addressed. There was nothing from which the defendant could infer that the production would be required at the trial; and the notice itself allowed no time to procure them. Secondary evidence was therefore *inadmissible. But, supposing the notice to be sufficient, neither the admissions, nor the book, were evidence that any such letters had been sent. The defendant is only ordered to admit that certain extracts are true extracts from a certain book called

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(1) Before Lord Denman, Ch. J.,
Littledale, Patteson, and Williams, JJ.

(2) 23 R. R. 751 (8 Stark. 8).

(3) 45 R. R. 783 (7 Ad. & El. 627).

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a "letter-book," kept by the defendant. He does not admit that the letter-book contains true copies of the original letters, nor that such letters were ever sent, or even written. All just exceptions to the admissibility of the book itself, or the extracts from it, are saved. If, therefore, the letters were relied upon as such, then the book was not evidence of them. But, if the book was put in evidence, not as containing copies of letters, but as a document containing a statement of the transactions made by the defendant himself, or his clerks with his privity, then every part of it relating to that transaction ought to have been read, if required. If the book had been headed, "Detail of circumstances relating to transactions between Sturge and Buchanan & Co." no doubt the whole would have been made evidence, if the plaintiff chose to read a part. Yet the book was, in fact, only a narrative made up of a series of extracts and copies of letters. If the plaintiff had read a partial extract from one letter, the whole might have been read by the defendant. So where he reads one of a series of extracts from correspondence, the whole series ought to be laid before the jury, if it tends to explain, qualify, or illustrate the parts selected by the plaintiff. The fallacy lies in treating the document as separate letters, and not as one entire book. *Catt v. Howard* (1) was a *Nisi Prius* decision against the party who ultimately succeeded, *and, of course, was very little discussed. It is not clear, too, what was the subject of the entries there referred to, or the degree of connexion between them. The term "unconnected" used in the report is very general. As to *Prince v. Samo* (2), there is a distinction between evidence of a conversation, which is a term of vague import and undefined extent, and proof of a single document. Where a book is produced, the evidence is confined within the compass of it, and no question can arise as to what is, or is not, a part of the same document.

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Cur. adv. rult.

LORD DENMAN, Ch. J., on a subsequent day in this Vacation (22nd June), delivered the judgment of the COURT:

As to the evidence, the plaintiff had had the advantage of seeing some letters written and sent by the defendant to his partner, exclusively, I presume, by means of a suit in Chancery. He gives him notice to produce three of them, which he particularly describes. He then summons him before a Judge to admit copies

(1) 23 B. R. 751 (3 Stark. 3).

(2) 45 B. R. 783 (7 Ad. & El. 627).

of those three letters: the Judge orders accordingly, by consent and subject to all just exceptions; and the copies are signed by the Judge and the attorneys; the defendant at the same time agrees to produce his letter-book at the trial. The notice is proved; the signed copies produced; which are objected to, because the defendant had agreed to produce the book; the book is then called for and produced: plaintiff proposes to read the three letters.

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This proceeding gives rise to several objections.

First, that the notice is insufficient, the letters having *been sent to the partner in New South Wales; and therefore no secondary evidence receivable.

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The sufficiency of the notice in all cases depends on circumstances. If the letters are in New South Wales, this notice is nothing. But there is no proof of this, nor any presumption. This action was brought in 1832; proceedings had since been commenced in Chancery, and were greatly prolonged: all documents were probably sent over and produced, and would remain in England, where they were likely to be wanted. The notice then was good; secondary evidence was admissible; and the plaintiff was free to call for the letter-book as a means of proving the contents of those particular letters.

Secondly, even if he was not, defendant had expressly undertaken to produce that letter-book for proof of those letters. He does so; but contends that they are not to be read without proof that they actually were sent.

The answer is, first, that the description of them as sent is perfectly immaterial, the writing of them by defendant being the only fact required to make them evidence. Secondly, the letter-book, when produced in pursuance of the undertaking, clearly shows that they were sent. The very fact of their being transcribed into such a book proves this as against the party keeping it. Defendant now says, "as you prove the letters by my book, I have a right to read in evidence the whole of that book; or at least the whole correspondence on the subject, as it is found in the same book. You produce a document of my writing, and must read the whole." *But how can this be called a document? It is a series of copies of letters written from time to time, on principle exactly the same thing as if they had been kept in his counting-house on a file. It is like proving what a party said in one conversation: one of these letters, or one of these conversations,

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may be proved without authorizing the opposite party to bring forward, for his own benefit, what he himself said or wrote in another conversation, or a different letter. The late decision in *Prince v. Samo* (1) carries this principle much further. That the rest of the correspondence may throw light upon these parts of it, is true; but the light may be a false one. Plaintiff is not bound to know whether it would or not; nor whether any other statements were made as they appear in the book, or, if made, were true.

It was surmised that an unfair advantage had been taken of the defendant in obtaining a knowledge of these letters through a suit in Chancery, and then producing them without the answer, which may have greatly qualified and altered their effect. But I cannot think that a Judge at Nisi Prius has any thing to do with these considerations: he is to enquire only whether due notice has been given; whether the documents have been proved to exist; whether copies are well proved. Or (taking this to be a piece of original evidence, as written by defendant or by his authority) he is to prove the handwriting, or the authorization. He does this by the undertaking to produce the book in proof of the three letters described, and of the three letters only; the mode of proving them can give the other side no new *rights. (His Lordship then proceeded to give judgment on the merits of the case, and on the alleged misdirection.)

Rule discharged.

[*606]

1839.
June 18.

[616]

WAIN v. BAILEY (2).

(10 Adol. & Ellis, 616—618; S. C. 2 P. & D. 507.)

The maker of a note, not negotiable, cannot refuse to pay the amount when due, on the ground that the payee has not the note in his possession or power, and cannot produce it for the purpose of delivering it up to the maker on payment.

ASSUMPSIT on a promissory note made by defendant, payable to plaintiff (not to order, or bearer) on the 25th March. Plea, that, when the note became due, to wit on &c., defendant was ready and willing to have paid plaintiff the amount of the said note, whereof plaintiff then had notice, and defendant then requested plaintiff to produce the said note for the purpose of the same being delivered up to him, the defendant, on payment of the amount

(1) 45 R. R. 783 (7 Ad. & El. 627). the Bills of Exchange Act, 1882 (45 & (2) Compare, as to negotiable bills, 46 Vict. c. 61), s. 32 (4).—R. C.

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thereof; but that plaintiff, when so requested to produce the same for the purpose aforesaid, had not the said note in his power, custody, or possession, nor could then deliver or have delivered it up to defendant, and confessed and admitted that he could not then deliver up the same to defendant, if defendant should then pay the amount thereof. Whereupon defendant did then refuse to plaintiff the amount of the said note, as he lawfully might &c.; and defendant says that he has always, since the said note became due, and since the said admission and confession of the plaintiff, been, and still is, ready and willing to pay plaintiff the amount of the note on the same being produced and delivered up to him on payment thereof; but plaintiff has never since produced or offered to deliver it up to defendant on payment thereof &c. Verification. Replication, *de injuria absque tali* &c.

The action was tried at the Derbyshire Spring Assizes, 1838, when a verdict was found for the defendant.

In Easter Term following, *Clarke* obtained a rule to *show cause why judgment should not be entered for the plaintiff *non obstante reredicto*. [*617]

Whitehurst now showed cause :

The question on this record is, whether the maker of a note, who is ready, and offers, to pay it when due, is bound to do so except upon redelivery? *Hansard v. Robinson* (1) is in point. It was there decided that the holder of such a security cannot sue upon it without producing and offering to deliver it up. Lord TENTERDEN there says, "What is the custom in this respect? It is that the holder of the bill shall present the instrument at its maturity to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer. If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer, or retain his money?" Supposing the note to have been negotiable, this would be a direct authority.

(PATTESON, J.: It shows only that the holder cannot recover on a lost note; it was not decided that he could not have recovered if he had found it.)

(1) 31 R. R. 166 (7 B. & C. 90).

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The reason assigned, namely, the want of a voucher and security against a second demand, applies equally whether the note be lost or not. The only distinction is the non-negotiability of the bill in this case. But that is not a sufficient protection, for the plaintiff may have pledged or equitably assigned it. Even if he has not parted with it, the defendant ought not to be exposed to the difficulty of proving *payment, in case he should be again sued on it. He cannot, at common law, compel the plaintiff to give a receipt, and is not obliged to take a witness with him.

(PATTESON, J. : In *Rolt v. Watson* (1) the plaintiff was allowed to recover for goods sold, though defendant had accepted a bill for the amount, which had been lost before it had been indorsed by the drawer ; your argument would equally apply to such a case.

LITTLEDALE, J. : The defendant would be exposed to the same risk, if he were sued on a bond, which the obligee is not bound to redeliver.)

The action is founded on the custom of merchants, for this is a note within the custom, though not negotiable : *Smith v. Kendall* (2), *Rex v. Box* (3) ; if so, the custom to redeliver on payment must be observed. The promise is only to pay agreeably to the custom.

Clarke, contra, was stopped by the COURT.

Per CURIAM (4) :

The plea is bad.

Rule absolute for judgment non obstante veredicto.

1839.

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BARRY v. ARNAUD.

(10 Adol. & Ellis, 646—673 ; S. C. 2 P. & D. 633 ; 9 L. J. (N. S.) Q. B. 226.)

A collector of customs, appointed by the commissioners under 3 & 4 Will. IV. c. 51, s. 6(5), to collect duties on articles coming into the kingdom, and, on payment, sign bills of entry which, by sect. 18, are a warrant for delivery of such articles to the party paying, is not a mere servant of the commissioners, but a substantive and immediate officer of the Crown ; and his functions, as collector, are ministerial. Therefore, he is liable in an action for non-feasance in the exercise of his office ; as for refusing to sign a bill of entry without payment of an excessive duty.

The term "wreck" in 3 & 4 Will. IV. c. 52, s. 50(5), is not necessarily

(1) 29 R. R. 563 (4 Bing. 273).

(2) 6 T. R. 123.

(3) 6 Taunt. 325.

(4) Lord Denman, Ch. J., Little-
dale, Patteson, and Williams, JJ.

(5) As to the statutes cited in this case, see now the Customs Law Consolidation Act, 1876 (39 & 40 Vict. c. 36), *passim*.—R. C.

limited to goods which become forfeit to the Crown or its grantee by not being claimed within a year and a day, according to stat. Westminster 1 (3 Edw. I. c. 4).

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Goods were imported into this country, warehoused, entered for exportation, and shipped for Belgium: the vessel was lost within the English port, and the goods, being partly thrown upon the shore, and partly found floating on the sea and landed, were conveyed to the warehouse of the lord of the manor, and immediately claimed by the owner. Held, that they were chargeable with duty as "wreck, brought or coming into the United Kingdom," within 3 & 4 Will. IV. c. 52, s. 50.

THE following case was stated by consent, under a Judge's order, for the opinion of this Court.

This action is brought by the plaintiff, a merchant of London, against the defendant, who was the collector of his late Majesty's customs, and employed in the said duty of collector by the order and with the concurrence of the commissioners of his said late Majesty's customs for the port of Liverpool, for refusing, on the 6th day of August, 1836, to accept from the plaintiff the sum of 144*l.* 12*s.* 8*d.*, the same then being (as the plaintiff alleges) the full amount of the customs duty then due and payable to our lord the late King upon the delivery for home consumption of certain foreign goods, to wit 38,569 pounds' weight of unmanufactured tobacco, then being the property of the plaintiff, which had before then been brought or come into the United Kingdom, and were then deposited in certain warehouses at Liverpool, and for refusing to sign a bill of entry of the said tobacco upon the due payment of the said sum, whereby *the plaintiff was prevented from obtaining the delivery of the said tobacco from the said warehouse, and from selling and disposing thereof to great advantage: and, the defendant having pleaded Not guilty, and issue having been joined thereon, the parties have agreed to the following case.

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In or about March, 1836, the tobacco in question amounted to 38,569 pounds' weight, having been, together with a certain other quantity of the same, now lost, imported into Great Britain from the place of its growth, and warehoused in certain warehouses at Liverpool, in the county of Lancaster, being then the property of W. and J. Brown & Co.; was duly entered for exportation from the port of Liverpool by Joseph Johnstone, consigned to J. Parswell Pilgrim Esquire at Antwerp, in the kingdom of Belgium, and then shipped on board a ship called the *London Packet*, bound for Antwerp; with which tobacco the said ship sailed on the said intended voyage: but, shortly after leaving Liverpool, viz. on or about the 29th day of the said month of March, the said ship, after

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she got out of the limits of the port of Liverpool, met with contrary winds and bad weather, and was thereby forced and compelled to re-enter the limits of the said port, when and where she struck on certain sands in the Irish Sea within the said limits, and was broken to pieces and became a total wreck, and all persons on board were drowned; but the tobacco in question, which formed part of the said ship's cargo, was saved; that is to say, some of it was found floating on the sea, and the remainder was thrown on the shore of the English coast by the sea, and was conveyed to the warehouse of Mr. Atherton the lord of the manor, into which the said tobacco was brought or came *as aforesaid; and the said tobacco was afterwards conveyed to a certain warehouse at Liverpool, where it was sold on the 12th day of April, 1836, by the order of the said Joseph Johnstone, with the consent of the proper officers of his said late Majesty's customs in that behalf: and the proceeds were applied, first to the payment of salvage and other usual charges, and then to the benefit and partial relief of the underwriters, who had insured the same against loss by perils of the sea; and the plaintiff, being the highest bidder for it, became the purchaser of the same.

Unmanufactured tobacco was, on the 6th day of August, 1836, subject to a duty of customs on importation into the United Kingdom of 3s. per pound; but on that day the tobacco in question had, by the absorption of sea water, increased in weight in the proportion of 60 per cent. In consequence of the damage it had thereby sustained under the circumstances hereinbefore detailed, it could not be sold for a sum amounting to 3s. per pound on its then weight, and was not in fact worth more than a total sum of 2,892*l.* 13*s.* 6*d.*

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By stat. 3 & 4 Will. IV. c. 52, s. 50, it is enacted, "that all foreign goods, derelict, jetsam, flotsam, and wreck, brought or coming into the United Kingdom or into the Isle of Man, shall at all times be subject to the same duties as goods of the like kind imported into the United Kingdom respectively are subject to" (1): "Provided also, *that all such goods as cannot be sold for the

(1) The words immediately following are: "Provided always, that if, for ascertaining the proper amount of duty so payable, any question shall arise as to the origin of any such goods, the same shall be deemed to be of the growth, produce, or manufacture of such country or place as the commissioners of his Majesty's cus-

toms shall upon investigation by them determine: Provided also, that if any such goods be of such sorts as are entitled to allowance for damage, such allowance shall be made under such regulations and conditions as the said commissioners shall from time to time direct: Provided also, that all such goods as cannot" &c.

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amount of duty due thereon shall be delivered over to the lord of the manor or other person entitled to receive the same, and shall be deemed to be unenumerated goods" (1). And by stat. 3 & 4 Will. IV. c. 56, schedule "Inwards," unenumerated goods, unmanufactured, are subject only to an *ad valorem* duty of 5*l.* for every 100*l.* of the value.

The defendant was, at the time of the tender hereinafter mentioned, the collector of his late Majesty's customs for the port of Liverpool, and employed in the said duty of collector by the order and with the concurrence of the Commissioners of his said Majesty's customs. His duty was to collect the proper amount of duty on each article for which an entry was tendered, and, upon such duty being paid, to sign a bill of entry acknowledging the receipt, and which then became a warrant authorising the delivery of such article from the charge of the proper officers. He had not, according to the proper course of his office, the actual custody of, or controul over, the articles upon which the duty was payable, nor had he in fact the actual custody of, or controul over, the tobacco in question; except that the officers who had such actual custody and controul might not deliver the article to the owner without such bill of entry being so signed.

On the 6th day of August, 1836, the plaintiff tendered to the defendant the sum of 144*l.* 12*s.* 8*d.*, as and for the customs duty due on the said tobacco on its being *entered for home consumption, being at and after the rate of 5*l.* for every 100*l.* of the value of the said tobacco, and tendered to the defendant the usual bill of entry for the signature of the defendant, with two duplicates of the said bill of entry duly made and written, at the same time offering to deliver to the defendant as many more duplicates of the same as he should require; when the defendant refused to accept the said sum of 144*l.* 12*s.* 8*d.* in discharge of the customs duties due and payable in respect of the said tobacco, and also refused to sign the said bill of entry acknowledging the receipt, without which signature the officer having the custody of the tobacco could not deliver it to the plaintiff.

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The questions for the opinion of the Court are: 1. Whether the tender was sufficient: and, if so, then, 2. Whether the defendant is liable to this action under the above circumstances. If the Court shall be of opinion in the affirmative on both the questions, then judgment to be entered for the plaintiff for the damages laid in the declaration to secure the delivery of the said tobacco to the plaintiff,

(1) "And shall be liable to and be charged with duty accordingly."

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on payment by the plaintiff to the Crown of the said sum of 144*l.* 12*s.* 8*d.* ; and also to secure the payment of costs and of such further sum for damages as shall or may be awarded to the plaintiff by &c. (The case then named an arbitrator.) But if the Court shall be of opinion in the negative on either question, then the judgment to be entered for the defendant with costs.

[After argument, the COURT took time for consideration.]

[669] LORD DENMAN, Ch. J., in this Vacation (June 22nd), delivered the judgment of the COURT (1) :

Two points were made in this case. The first in importance and order was, whether assuming that the plaintiff had tendered the proper amount of duty, any action could be maintained against the defendant for refusing to accept it and sign a bill of entry, whereby the plaintiff was prevented from obtaining the delivery of the tobacco in question and selling it to advantage. And we are of opinion that such action is maintainable, although no malice or ill motive is imputed to the defendant. The case states him to be the collector of customs at Liverpool, employed as such by the order of *the commissioners, and “that his duty was to collect the proper amount of duty on each article for which an entry was tendered, and, upon such duty being paid, to sign a bill of entry acknowledging the receipt, which then became a warrant for the delivery of such article from the charge of the proper officers.” By stat. 3 & 4 Will. IV. c. 51, s. 2, her Majesty is authorised to appoint commissioners for the collection and management of the customs. By sect. 6, the Treasury, or these commissioners under the authority of the Treasury, may appoint proper persons to execute the duties of the several offices necessary to the due management and collection of the customs, and all matters connected therewith, under the control and direction of the commissioners; and, by sect. 7, every person employed on any duty or service relating to the customs, by the orders or with the concurrence of the commissioners, shall be deemed to be the officer of the customs for that duty or service.

Taking the statement in the case and these clauses together, the defendant appears to be not merely the agent and servant of the commissioners, but to be himself a substantive and immediate officer of the Crown; and he is charged with the execution of a certain limited duty.

(1) Lord DENMAN, C. J., LITTLEDALE, J., PATTESON, J., and COLERIDGE, J.

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It is true that, in the performance of that duty, he is subject to the controul of the commissioners; but it is still his own duty, not theirs, that he is to perform; the acts which he does are his own acts, not theirs; their control is not an arbitrary one, but limited by the provisions of the statute wherever they apply, and does not absolve him from responsibility to persons affected by the due performance or neglect of his duties.

The nature of those duties is next to be considered; and, as regards the present question, they are plainly and merely ministerial. He is, according to the statement, to collect the proper amount of duty, and sign the bill of entry. This is not the less a ministerial duty because, in some instances, as in the present, it may not be clear upon the face of the statute what the proper amount of duty may be. Difficulties both of law and fact arise repeatedly to ministerial functionaries, such as the sheriff, in the discharge of his duties; but these do not alter their nature.

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The defendant, then, is a public ministerial officer, and, being so, he is responsible for neglect of his duty to any individual who sustains damage by such neglect. *Schinotti v. Bumsted* (1) is a strong authority to this effect, the facts in that case respecting the commissioners of the lottery tending much more to raise a doubt whether the defendants had not a judicial discretion entrusted to them; and in *Lacon v. Hooper* (2), which was an action against the commissioners of customs for not making a certain order for the payment of money to which the plaintiffs claimed to be entitled under an Act for the encouragement of the South Sea whale fishery, it was not questioned but that even they would be liable to the action, if the neglect of duty were made out.

We pass on, therefore, to the second question, whether, under the circumstances stated in the case, the tobacco in question is to be considered wreck within the fiftieth section of stat. 3 & 4 Will. IV. c. 52. It is conceded by the plaintiff that, if the word "wreck" in *that clause be confined to that only which would pass to the Crown or the Crown's grantee under the prerogative or franchise of wreck, these goods do not fall within that predicament; but it is contended by him that the word is not to be construed in so limited a sense; and we are of opinion that, according to established rules of construction, it ought not to be so construed. The section, in its enacting part, professes to extend to all "foreign goods, derelict, jetsam, flotsam, and wreck, brought or coming into the United

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(1) 6 T. R. 646.

(2) 6 T. R. 224.

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Kingdom"; and, without reference to their condition or value, subjects them to the same duties as imported goods of the same kind. If the section had stopped here, it would have been difficult to say that these goods were imported goods, for they were in the act of exportation: the owners had done nothing except with a view to exportation. Against their will, by the violence of the storm, they were separated from the vessel in which they were placed, and from the charge of those to whose custody they were intrusted, and either cast on shore, or, being found floating, carried thither: if imported, by whom could they have been said to be imported? But, if not imported, were they liable to no duty? Would it not then have been reasonably urged that they fell within the very words and intent of the enactment, and became subject, as wreck, to the same duty as if they had been imported?

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If so, we must necessarily apply the same rule of construction to the proviso at the end of the section to relieve them, as we should have done to the enacting part to charge them. The word "wreck," no doubt, in both parts comprehends goods which strictly and technically speaking are "wreck;" but, as it is capable also *of a larger sense, and as in both parts the object of the section can only be fully obtained by giving it that larger sense, we ought so to understand it. We are additionally led to this by considering that the term of contrast to the word "wreck" is not goods unforfeited, or goods whereof the owner is known, but goods imported, as if the distinction present to the minds of those who framed it was, not between goods subject and goods not subject to a franchise, but between goods arriving in the regular course of importation and those coming by the casualties of the seas and storms; and accordingly, by the proviso, they are to be delivered over to the lord of the manor, or (using the most general words) "other person entitled to receive the same."

Upon both grounds, therefore, we think the plaintiff entitled to maintain the action, and to our judgment according to the terms provided in the special case.

Judgment for the plaintiff.

HOLMES *v.* CLIFTON, ESQUIRE.

(10 Adol. & Ellis, 673—675; S. C. 2 P. & D. 556; 8 L. J. (N. S.) Q. B. 247.)

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Where the sheriff on a *fi. fa.* returns that he has levied part of the debt, and that the debtor has no goods whereof the residue can be levied; and the creditor accepts the amount levied on account, and towards payment, of his debt; he is not thereby precluded from bringing an action against the sheriff for a false return.

CASE against the sheriff of Lancashire, for not levying under a *fi. fa.*, duly indorsed with a direction to levy of the goods of L. M. 1,105*l.* for debt, and 4*l.* for costs; and falsely returning that he had levied 160*l.* and retained 6*l.* 10*s.* for poundage and expenses, and had the residue 153*l.* 10*s.* ready to render to plaintiff in part satisfaction of his debt &c.; and that the said L. M. had no more goods in his bailiwick, whereof the rest of the debt could be levied.

Plea, that defendant levied 160*l.* of the goods of L. M., and retained 6*l.* 10*s.* for poundage and expenses, as stated in the return; and that afterwards, and before action brought, plaintiff accepted and received the said residue, 153*l.* 10*s.*, and the same was then paid to plaintiff, for and on account, and in and towards payment and satisfaction, of the debt and damages in the writ mentioned; and the plaintiff then thereby waived and relinquished all cause and right of action against defendant. Verification.

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Replication, that the plaintiff accepted and received the said sum, and the same was paid to plaintiff for and on account, and towards payment and satisfaction, of the said debt and damages; but not in payment or satisfaction of the said debt and damages, in manner and form &c. Conclusion to the country.

Demurrer, for that the plaintiff did not, in his replication, traverse or put in issue any material allegation in the plea; but only raised an immaterial issue, and confessed so much of the plea as was necessary to bar the action, without avoiding it. Joinder.

Knowles, for the defendant, relied upon *Beynon v. Garrat* (1) as exactly in point, and as deciding that, by taking the money out of Court, the plaintiff affirmed the return of the sheriff, and thereby estopped himself from maintaining an action for a false return; and he cited *Watson v. Wace* (2), as illustrating the same principle.

(1) 1 Car. & P. 154.

(2) 5 B. & C. 153.

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Bramwell, contra, was not heard.

Per CURIAM (1) :

The case of *Beynon v. Garrat* (2), if correctly reported, cannot be maintained. It might as well be argued that a creditor, who accepts part of his debt, is precluded from recovering the rest.

Judgment for the plaintiff.

1839.
June 22.
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REG. v. GOVERNORS, &c. OF ST. ANDREW, HOLBORN,
AND ST. GEORGE THE MARTYR, MIDDLESEX.

(10 Adol. & Ellis, 736—739.)

Mandamus to the officers of a parish included in an union (formed under 4 & 5 Will. IV. c. 76, s. 26) reciting the due appointment of certain persons to be guardians of the poor of the union, and directing them to pay a sum, out of the poor rates collected by them, to the treasurer of the union. Return, that the said supposed guardians were not, nor were any of them, duly appointed under the provisions of the Act, &c.; and that, at the issuing of the said writ, the said supposed guardians therein mentioned were not, nor were any of them, guardians of the poor of the said union.

Held, that the return was insufficient for not distinctly setting forth any defect in the appointment.

Return quashed on motion, and peremptory *mandamus* awarded.

MANDAMUS to the governors and directors of the poor of the above parishes, appointed under stat. 6 Geo. IV. c. clxxv. (local and personal, public), and to C. Boydell, their clerk, reciting the formation of the said parishes into a union under 4 & 5 Will. IV. c. 76, and "that, under the provisions of the last-mentioned Act of Parliament, and under the rules, orders, and regulations of the said Poor Law Commissioners, certain persons have been duly appointed guardians of the poor of the said union, and, as such guardians, have taken upon themselves the maintaining, providing for, regulation, and employment of the poor of the said union;" the issuing of a precept by the said guardians, under the provisions of the last-mentioned Act, and the rules and regulations of the said commissioners, directed to the defendants, requiring them to pay a certain sum to the treasurer of the union out of the poor rates of the united parishes, collected by them, towards the relief of the poor of the said parishes, and towards defraying such proportion of the general expenses of the union as was lawfully chargeable *thereon; and the refusal of defendants to obey the precept; and commanding

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(1) Lord Denman, Ch. J., Patteson, absent.
and Williams, JJ. Littledale, J. was (2) 1 Car. & P. 154.

them forthwith to obey the said precept, and to pay the said sum to the treasurer, or to collect it by a rate to be made for that purpose, &c.

The return to the writ was in the following words. “We, the major part of the said governors and directors, and the said Charles Boydell, do humbly certify and return to our said Lady the Queen, upon the day and at the place in the said writ mentioned, that the said supposed guardians of the poor of the said union, in the said writ mentioned, were not, and never have been, and are not now, nor were, nor are any of them, duly appointed guardians of the poor of the said union, under the provisions of the said Act of Parliament in the said writ secondly mentioned, or under the said rules, order, and regulations of the said Poor Law Commissioners therein in that behalf also mentioned, as in and by the said writ is stated and supposed; and that, at the time of the coming of the said writ to us, the said supposed guardians of the poor of the said union therein mentioned were not, nor have they been, nor are they now, nor were nor are any of them, guardians of the poor of the said union. Wherefore we, the major part of the said governors and directors, and the said Charles Boydell, have refused, and still do refuse, to obey the said precept in the said writ mentioned, as in and by the said writ we are commanded.”

Sir J. Campbell, Attorney-General, in Trinity Term last, obtained a rule to show cause why the return should not be quashed for insufficiency, and a peremptory *mandamus* awarded. Several objections were made to the return; but, as the judgment of the Court proceeded only on one of them, namely, that it did not specify the grounds on which the appointment of guardians was *supposed to be illegal, or void, the rest have not been noticed. On the last day of the Term (1),

Sir F. Pollock and *Erle* showed cause, and contended that the return was sufficient, referring to the cases in which a return of “not duly elected” had been held to be sufficient on a *mandamus* to admit to offices: *Rex v. Williams* (2).

Sir J. Campbell, Attorney-General, and *Tomlinson*, *contrà*, contended that the return was too general; and they relied upon

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(1) Wednesday, June 12, 1839, before Lord Denman, Ch. J., Little-
dale, and Patteson, JJ. (2) 32 R. R. 511 (8 B. & C. 681).

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Rex v. The Mayor, &c. of Doncaster (1), *Rex v. The Mayor and Aldermen of Doncaster* (2), and *Rex v. Mayor, &c. of Liverpool* (3). They also contended that, although the appointment might have been irregular, it continued in force until duly avoided.

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT :

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A *mandamus* issued to the governors and directors of the poor of St. Andrew's, Holborn, to pay monies, collected for the relief of the poor under an order of the Poor Law Commissioners, to a board of guardians of an union described in that order as duly appointed. The governors and directors returned to this writ that the guardians were not duly appointed. We have been called on to quash this return on motion, and award a peremptory *mandamus*, on the ground that it is manifestly bad and illusory. On the other hand, the return is contended for as good, by reference to proceedings *on *mandamus* to corporate officers bound to admit by swearing in persons elected, where "not duly elected" has been in several cases particularly in those most lately decided, holden a good return. But we think the distinction clear; the person elected has no right to compel admission without showing a good title *in omnibus*, and must be prepared to prove it. If his election, *de facto* made, is bad in law for any defect, it would be wrong to admit him. But, in this case, the commissioners have power to form unions; elections of boards are to be made as the Act directs. This board is in full exercise of all its authority; monies collected for the use of the poor are to be paid according to orders issued by the commissioners; and their orders have the force of law, unless and until they are set aside by this Court. Here they can do the thing required; and those who obey their orders will incur no responsibility by doing so. If there really were any doubt whether the existing guardians are duly appointed, it must arise from some defect existing in point of fact, which ought to be distinctly set forth by any one who disputes their *primâ facie* power. If any such fact had been returned to the writ, we might have exercised our judgment whether, if established, it would have defeated the commissioners' authority; but the statement that, for some undisclosed reason, the parties charged with a

(1) 2 Ld. Ray. 1564.

(2) Sayer's Rep. 37.

(3) 2 Burr. 723.

plain duty refused to perform it because they chose to say, in general terms, that those to whom they are bound are not duly appointed to their office, is wholly insufficient.

A peremptory *mandamus* must therefore go.

Rule absolute (1).

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JONES v. FLINT (2).

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(10 Adol. & Ellis, 753—761; S. C. 2 P. & D. 594; 9 L. J. (N. S.) Q. B. 252.)

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Plaintiff and defendant orally agreed (in August) that defendant should give 45*l.* for the crop of corn on plaintiff's land, and the profit of the stubble afterwards; that plaintiff was to have liberty for his cattle to run with defendant's; and that defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields; defendant was to harvest the corn, and dig up the potatoes; and plaintiff was to pay the tithe.

Held, that it did not appear to be the intention of the parties to contract for any interest in land, and the case was, therefore, not within the Statute of Frauds, 29 Car. II. c. 3, s. 4, but a sale of goods and chattels, as to all but the lay grass, and, as to that, a contract for the agistment of defendant's cattle.

DEBT. The declaration stated that defendant, to wit on &c., was indebted to plaintiff in 45*l.*, as well for a certain crop of growing wheat, and a certain crop of growing barley, of the plaintiff, before then bargained and sold by plaintiff to defendant at his request, and by defendant, under and by virtue of that bargain and sale, accepted, reaped, cut down, had, taken, and carried away, as also for a certain crop and divers quantities of potatoes of plaintiff, before then bargained and sold by plaintiff to defendant at his request, and by defendant, under and by virtue of that bargain and sale, accepted, dug up, had, taken, and carried away; as also for the use of certain land of plaintiff, and the eatage of grass, clover, and stubble thereon growing, and being *by plaintiff before then let to defendant at his request, and by defendant, according to such letting, had and used in and for the depasturing of cattle for a long time before then elapsed; and in 45*l.* on an account stated (3).

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(1) As to quashing a return on motion, see *Reg. v. Payn*, 45 R. B. 505 (6 Ad. & El. 392, 402); *Reg. v. St. Saviour's, Southwark*, 7 Ad. & El. 925.

(2) Referred to by KAY, J. in *M'Manus v. Cooke* (1887) 35 Ch. D. 681, 688, 56 L. J. Ch. 662, 664.—R. C.

(3) The particulars of demand were as follows. "This action is brought

to recover the sum of 45*l.*, as well for a crop of growing wheat and a certain crop of growing barley on the plaintiff's land, and a quantity of potatoes also growing thereon, sold by plaintiff to defendant, at his request, on 7th August, 1835, as also for the use of certain land of the plaintiff, and the eatage of grass, clover and stubble thereon growing, and being by the

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Pleas. 1. As to all but 35*l.* 11*s.* 10*d.*, *nunquam indebitatus*. Issue thereon.

2. As to 5*l.*, parcel of the 35*l.* 11*s.* 10*d.*, payment before the commencement of the suit, and acceptance in satisfaction and discharge of 5*l.* Replication, that defendant did not pay, and defendant did not accept, &c., in manner &c. Issue thereon.

3. As to 30*l.* 11*s.* 10*d.*, other parcel &c., tender before the commencement of the suit. Replication, denying the tender. Issue thereon.

On the trial before Bosanquet, J., at the Denbighshire Spring Assizes, 1837, it was proved that, in August, 1835, the plaintiff and defendant agreed orally that the defendant should give 45*l.* for the crop of corn on the plaintiff's land, and the profit of the stubble afterwards; that plaintiff was to have liberty for his cattle to run with the defendant's; that defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields. Defendant was to harvest the corn, and dig up the potatoes; and plaintiff was to pay *the tithe. It did not distinctly appear whether the sale was by the acre or not. The crops, &c., were taken by the defendant in conformity with the agreement. The payment and tender were proved, as pleaded; and the defendant's counsel contended that the plaintiff was not entitled to recover on the first issue, because the contract proved was for an interest in land, within sect. 4 of the Statute of Frauds. The learned Judge directed a verdict for the defendant on the second and third issues, and for the plaintiff on the first, reserving leave to move for a nonsuit. In Easter Term, 1837, *Jervis* obtained a rule accordingly. In Hilary Term last (1),

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Kelly and *Welsby* showed cause :

No interest in land passed by this contract. Nothing was sold but crops which, at the time of the delivery, would be goods within sect. 17 of stat. 29 Car. II. c. 3 (2), and, as there has been acceptance, no writing was necessary. In *Evans v. Roberts* (3) it was held that a sale of growing potatoes was not a sale of an interest in land. In *Crosby v. Wadsworth* (4) the sale of a growing crop of

plaintiff before then let to the defendant, at his request, and by the defendant, according to such letting, had and used in and for the depasturing of his cattle."

(1) Thursday, January 24th, 1839,

before Lord Denman, Ch. J., Little-dale, Williams, and Coleridge, JJ.

(2) See now the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4.—R. C.

(3) 29 R. R. 421 (5 B. & C. 829).

(4) 8 R. R. 566 (6 East, 602).

hay was held to be a sale of an interest in land ; but there the vendee was to mow the hay. The doctrine ought not to be extended beyond the authorities ; for it is notorious that occupiers of land continually make such bargains without any notion of parting with an interest in the land, or of giving, at the utmost, more than a license. The buyer here would have been a trespasser if he had done more than carry away the crop. The inclination *of the Courts has latterly been to hold similar bargains not to be for interests in land. It was so held in *Sainsbury v. Matthews* (1), though the vendee was to find diggers. *Parker v. Staniland* (2) is in favour of the plaintiff.

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Jervis and Meeson, contra :

Sainsbury v. Matthews (1) (as PARKE, B. pointed out) was a mere case of a sale to the plaintiff of potatoes ; and the plaintiff, had the potatoes been destroyed before the time for digging arrived, would have had no other right to the land, though, till that time, the agreement was not perfected, because till then it would not be known what was sold. In *Evans v. Roberts* (3) the vendor was to dig the potatoes : he could not, therefore, have parted with the interest in the land. In *Parker v. Staniland* (2) the land was a mere place of deposit, as the potatoes were to be taken immediately ; the land contributed nothing to the value of the article sold, after the sale. Here the crops, which include the grass growing, were to continue on the land ; and the case, therefore, resembles *Earl of Falmouth v. Thomas* (4) and *Carrington v. Roots* (5), where the contract was held to be for an interest in land.

COLERIDGE, J. : In *Earl of Falmouth v. Thomas* (4) the pleadings expressly connected the bargain as to the crops with an interest in land.)

The decision proceeds on general grounds. In *Carrington v. Roots* (5) the question arose incidentally ; and it was held that the vendee could not insist on his right to enter the land *and take the crops, because, by so doing, he claimed an interest in land, to which he was not entitled according to the Statute of Frauds.

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Cur. adv. vult.

(1) 4 M. & W. 343.

(2) 10 R. R. 521 (11 East, 362).

(3) 29 R. R. 421 (5 B. & C. 829).

(4) 38 R. R. 584 (1 Cr. & M. 89,

3 Tyr. 26).

(5) 46 R. R. 583 (2 M. & W. 248).

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LORD DENMAN, Ch. J., in this Vacation (June 21st) delivered the judgment of the COURT. After stating the nature of the action, his Lordship proceeded as follows :

A motion for a nonsuit was made, by leave, on the ground that the contract proved, which was oral only, was for an interest in land ; this was denied in answer ; and it was also contended that the state of the pleadings precluded the defendant from taking the objection (1).

The contract was made in August, when the crops were not ripe, though nearly so ; and the witnesses who proved it stated it thus. (His Lordship then stated the terms of the contract as they are given, p. 528, *ante*.) There was some dispute, upon the evidence, whether it was a sale by the acre or not.

Nothing, it will be observed, was expressly agreed on as to the possession of the land. It will be our duty, therefore, in construing the contract as to this particular, to have regard to its subject-matter, and to imply *so much, and only so much, as is necessary to give full effect to its expressed terms, nothing appearing in the subsequent acts of the parties to influence our construction either way.

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Three things were the subject-matter of the contract, crops of corn, potatoes, and the after eatage of stubble and lay grass. Of these all but the lay grass are *fructus industriales* ; as such, they are seizable by the sheriff under a *fieri facias*, and go to the executor, not to the heir. If they had been ripe at the date of the contract, it may be considered now as quite settled that the contract would have been held to be a contract merely for the sale of goods and chattels. And, although they had still to derive nutriment from the land, yet a contract for the sale of them has been determined, from this their original character, not to be on that account a contract for the sale of any interest in land. *Evans v. Roberts* (2) proceeds

(1) One question on the pleadings was, whether the objection on the Statute of Frauds could be taken on the general issue. As to this, the following authorities were referred to. Reg. Hil. 4 Will. IV., Pleadings in particular Actions, I. Assumpsit 1, 5 B. & Ad. vii. ; *Johnson v. Dodgson*, 46 R. R. 733 (2 M. & W. 653) ; *Elliott v. Thomas*, 49 R. R. 558 (3 M. & W. 170) ; *Barnett v. Glossop*, 1 Bing. N. C. 633 ; *Carrington v. Roots*, 46 R. R. 583 (2 M. & W. 248) ; *Shearwood v. Hay*, 5 Ad. & El. 383. See *Buttemere v.*

Hayes, 5 M. & W. 456 ; *Eastwood v. Kenyon*, Hil. T. 1840, 11 Ad. & El.

Another question was as to the effect of the two pleas of partial tender and partial payment. As to this the following authorities were referred to. *Ravenscroft v. Wise*, 1 Cr. M. & R. 203, 4 Tyr. 741 [overruled *Archer v. English* (1840) 5 M. & W. 873] ; *Meager v. Smith*, 4 B. & Ad. 673 [overruled *Kingham v. Robins* (1839) 5 M. & W. 94] ; *Middleton v. Brewer*, 3 R. R. 643 (1 Peake, 20).

(2) 29 R. R. 421 (5 B. & C. 829).

on this principle. That was a sale of growing potatoes. HOLROYD, J. says (1), "This is to be considered a contract for the sale of goods and chattels to be delivered at a future period. Although the vendee might have an incidental right, by virtue of his contract, to some benefit from the land while the potatoes were arriving at maturity, yet I think he had not an interest in the land within the meaning of this statute." And LITLEDALE, J. says (2), "I think that a sale of any growing produce of the earth (reared by labour and expense) in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered a sale of an interest in or concerning *land within the meaning of the fourth section of the Statute of Frauds." BAYLEY, J. lays down the same principle, and qualifies, not the judgment, but the *dictum*, of MANSFIELD, Ch. J. in *Emmerson v. Heelis* (3), which certainly is at variance with the decision of the Court of King's Bench in *Evans v. Roberts* (4). It was a *dictum*, however, unnecessary to the decision.

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The present case differs from *Evans v. Roberts* (4) in this, that there the potatoes were to be dug up by the seller; the judgments, however, do not proceed on this distinction, although it was not unnoticed. HOLROYD, J. expressly says (5) that, even if they were to be dug up by the buyer, "I think he would not have had an interest in the land." And we agree that the safer grounds of decision are the legal character of the principal subject-matter of sale, and the consideration whether, in order to effectuate the intentions of the parties, it be necessary to give the vendee an interest in the land. Tried by these tests, we think that, if the lay grass be excluded, the parties must be taken to have been dealing about goods and chattels, and that an easement of the right to enter the land, for the purpose of harvesting and carrying them away, is all that was intended to be granted to the purchaser. It is very difficult to reconcile all the cases, and still more so all the *dicta*, on this subject, from the case of *Waddington v. Bristow* (6) to the present time: and we are therefore left at liberty to abide by a general principle.

Upon this principle, however, we are to examine whether the introduction of the lay grass into the contract ought to vary the decision. This is the natural *produce of the land, not distinguishable from the land itself in legal contemplation, until actual

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(1) 29 B. R. 427 (5 B. & C. 837).

(2) 29 B. R. 429 (5 B. & C. 840).

(3) 11 B. R. 520 (2 Taunt. 38).

(4) 29 B. R. 421 (5 B. & C. 829).

(5) 29 B. R. 427 (5 B. & C. 838).

(6) 2 Bos. & P. 452.

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severance ; it passes accordingly to the heir, not to the executor ; and in *Crosby v. Wadsworth* (1) it was decided that the purchaser of a crop of mowing grass, unripe, and which he was to cut, took an exclusive interest in the land before severance.

If, therefore, this be a case in which the parties intended a sale and purchase of the grass to be mowed or fed by the buyer, both on principle and authority the objection of the defendant must prevail.

Looking, however, at the facts, we think this was not such a bargain. It may well be doubted, upon all the evidence, whether any thing that could be called a crop of grass was in the ground, or in the contemplation of the parties at all : for it does not appear that any clover or other grass had been sown with the corn ; and the word grass seems merely to have been adopted by the witness in cross examination from the defendant's counsel. But, not relying upon this, we find that the plaintiff was to pay the tithe, and that, after the harvesting, he reserved to himself the right of turning his own cattle into the fields ; and we think that, however expressed, the more reasonable construction of the contract is, that the possession of the field still remained with the owner after the harvesting, as before ; it was not necessary to the vendee before, on account of the grass, because that, whatever it was, could not then be got at ; nor did it need preservation ; and afterwards it is more reasonable to consider the owner as agisting the vendee's cattle, than as having his own cattle agisted by *him whose interest at the best was of so very limited a nature.

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Upon these grounds, not impeaching the principle of *Crosby v. Wadsworth* (1), but deciding on the additional facts in this case, we think this incident in the contract does not alter its nature ; and the objection founded on the statute will not prevail.

This makes it unnecessary to consider the other points, and the rule will be discharged.

Rule discharged.

(1) 8 R. R. 566 (6 East, 602).

DOE D. HEIGHLEY *v.* HARLAND AND OTHERS.

(10 Adol. & Ellis, 761—763; S. C. 3 Jur. 1189.)

1839.
June 22.

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Where the lessor of the plaintiff in ejectment is son and heir of the lessor in a former ejectment, and claims under the same title, and against the same defendant, but brings his action for different premises, the Court will stay proceedings until the costs of the first action are paid.

And this, although the lessor in the first action was discharged as an insolvent, while in custody under attachment for non-payment of such costs.

HUMFREY, in last Easter Term, obtained a rule to show cause why an order, made by *PATTESON*, J. in the Bail Court, for staying proceedings in this action till the costs of a former ejectment were paid, should not be set aside. The present action was brought by the son and heir of the lessor of the plaintiff in the former action, against the same defendants, and upon the same title, but for different premises. *Humfrey* cited *Doe d. Taylor v. Harris* (1) as in point, where this Court, under similar circumstances, refused to stay proceedings. It also appeared that the lessor of the plaintiff in the first ejectment had been attached for non-payment of the costs, and had been discharged under the Insolvent Act, while in custody under such attachment. This, he contended, operated as a discharge of the costs, even if the Court *should be disposed to stay proceedings on the other ground. On 12th June, in this Term,

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Cresswell showed cause (2).

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered judgment as follows :

The case of *Doe d. Taylor v. Harris* (3) is contrary to all the other cases on this subject which are collected in Mr. Tidd's book, p. 1232, and by which it is clear that, where the title is the same, a second ejectment may be stayed until security for costs of a former ejectment is given, although the party suing in the second is not the same as in the first; for he must be privy in interest. We think, therefore, that there must be some mistake in the report of that case in omitting some peculiar circumstances; at all events we do not hold it binding. The other question is as to the effect of the discharge of the lessor of the plaintiff's father under the

(1) 4 Man. & Ry. 569. It is said there, in the judgment of the COURT, that the two ejectments were brought against different defendants.

(2) Before Lord Denman, Ch. J., Littledale, and Patteson, JJ.

(3) 4 Man. & Ry. 569.

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Insolvent Act, being then in custody under an attachment for these costs. Now that discharge is no actual satisfaction; and, as the only mode by which a defendant in ejectment can get his costs is by attachment, it is not like the case of a person taking his debtor under a *ca. sa.* when he might have sued out a *fi. fa.* There is a case in Barnes's Notes (1), where it was held that, if a defendant had the lessor of the plaintiff in custody under an attachment, he could not stay his proceeding in a second ejectment; which may have been on the ground that by keeping him in custody *he deprives him, in some sort, of the means of paying the costs of the first action; which ground does not exist here. This rule must be discharged, without costs.

Rule discharged.

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DOE v. WRIGHT (2).

(10 Adol. & Ellis, 763—783; S. C. 2 P. & D. 672.)

Trespass for mesne profits between 10th July, 1826, and the commencement of the suit. Pleas. 1. that plaintiff was not possessed of the premises *modo et formâ*. 2. that the premises were the soil and freehold of defendant during all the time, &c. Replication, by way of estoppel, to each plea, that, after 10th July, 1826, plaintiff commenced an action of ejectment for recovery of the same premises on a demise laid 10th July, 1826, for fourteen years, and a demise laid 26th December, 1831, for seven years, and an ouster on 27th December, 1831, and had judgment to recover his said terms; concluding with a prayer of judgment if defendant ought, during the said terms, to be admitted, &c.

Held, on general demurrer, that the replication was good:

And that a rejoinder, stating that no writ of execution was ever issued, nor had plaintiff ever had possession of the premises, but that a writ of error upon the judgment was still pending and undetermined, was bad.

The plea of *liberum tenementum* admits a sufficient possession of the plaintiff to support an action against a wrong doer, but denies his rightful possession, and asserts a right to immediate possession in the defendant.

TRESPASS for mesne profits. The declaration (18th June, 1837) complained of a breaking and entering, to wit on 10th July, 1826, into the plaintiff's manors of Hornby and of Tatham, with the tithes and appurtenances, and the rectory of the parish of Tatham, and the tithes thereof, of the plaintiff, and other lands in the county of Lancaster, and expelling plaintiff from his possession thereof, and keeping and continuing plaintiff so expelled until the commencement of the action, and, during that time, taking the rents and profits thereof to defendant's own use.

(1) *Benn v. Denn d. Mortimer*, LUSH, J. in *Burnaby v. Earle* (1874) Barnes, 180. L. R. 9 Q. B. 490, 492, 43 L. J. Q. B.

(2) Referred to in judgment of 209, 210.—R. C.

Pleas. 1. That plaintiff was not possessed of the manors, rectory, tithes, and premises in the declaration mentioned, or any, or either of them, in manner and form, &c.: conclusion to the country.

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2. As to breaking and entering the manors of H. and T., and the other lands (omitting the tithes and rectory), and expelling plaintiff from the possession *thereof, and keeping him so expelled for the time in the declaration mentioned; that the same are, and were during all the time above-mentioned, the close, soil, and freehold of defendant, &c. Verification.

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3. As to breaking and entering the tithes and rectory, that the same are, and were during all the time &c., the freehold of defendant, &c. Verification.

Replication to the first plea, that defendant ought not to be admitted to plead the said plea, because, after the said 10th July, 1826, to wit in Trinity Term, 2 Will. IV., in the Court of our late Lord the King before the King himself, George Wright, the defendant in this suit, by the name of George Wright, late of H. in the county of Lancaster, yeoman, was attached to answer John Doe (1), the plaintiff in this suit, wherefore the said G. Wright, with force and arms, broke and entered the manor of Hornby in the county of Lancaster with the appurtenances, and all the tithes arising therein; and the manor of Tatham with the appurtenances in the same county; and the rectory of the parish church of Tatham in the said county, and all the tithes within the said rectory and parish, which one Sandford Tatham had demised to the said John Doe for a term which had not then expired; and also wherefore the said George Wright, with force and arms, broke and entered a certain "other" manor of Hornby in the county of Lancaster (repeating exactly the same premises as before), which the said Sandford Tatham had demised to the said John Doe for a certain other term not then expired: and thereupon the said John Doe complained (stating a declaration in *ejectment on a demise of the first-mentioned premises on July 10th, 1826, and a demise of the secondly-mentioned premises on 26th December, 1831, for the terms of fourteen and seven years respectively, and an ouster of plaintiff by the defendant from the several premises on 27th December, 1831, the said several terms therein, and each of them, then and at the

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(1) As to former proceedings between the present parties, see *Wright v. Doe d. Tatham*, 1 Ad. & El. 3;

Same v. Same, 7 Ad. & El. 313; *Same v. Same*, 4 Bing. N. C. 489.

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time of the said complaint being unexpired; plea of Not guilty, and issue thereon; trial at the Assizes at Lancaster, August, 7 Will. IV.; verdict for plaintiff, and judgment of the Court of King's Bench in Michaelmas Term, 11th November, 1836): whereby the said John Doe recovered against the said George Wright his several terms aforesaid, then yet to come, of and in the several tenements aforesaid with the appurtenances, together with his damages, costs, and charges, &c.; as by the record and proceeding thereof, remaining in the said Court of King's Bench in full force and effect, more fully appeared. Averment, that the manors of H. and T. with the appurtenances, the tithes, rectory, &c., in the declaration mentioned, were respectively the same with the manors, tithes, rectories, &c., mentioned in the said recovery, record, and proceedings, and not other or different. Prayer of judgment if defendant, during the said terms in the said record mentioned, ought to be admitted to the said plea, contrary to the said recovery, record, and proceedings.

Replication to the second and third pleas, that defendant ought not to be admitted to plead the said pleas or either of them, because &c. (stating the action of ejectment on two demises, the pleadings, verdict and recovery exactly as on the replication to the first plea, with a similar averment of identity, and conclusion).

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Rejoinder to the replication to the first plea; that *the defendant ought to be admitted to plead the said plea, because heretofore, to wit on 2nd November, 1836, a writ of error was duly issued out of Chancery by defendant, to remove a transcript of the record and proceedings in the ejectment suit, mentioned in the replication, into the Exchequer Chamber. That the said writ of error was duly allowed on 2nd November, and was a *supersedeas* to all writs of execution upon the said judgment; and that no writ of execution ever issued at any time upon the said judgment, nor was the said John Doe ever in possession of the premises in the said declaration and replication mentioned, or any of them, or any part thereof. That the said record and proceedings were afterwards duly certified by the CHIEF JUSTICE in a transcript annexed to the writ of error, and delivered to the Justices and Barons in the Exchequer Chamber; which said writ of error, at the commencement of this suit, was in the said Exchequer Chamber duly deposited with, and in the hands of, the proper officer in that behalf, and in full force and effect, and the proceedings thereon pending and undetermined; and that, after the commencement of this suit, to wit on &c., the said judgment

was affirmed; and thereupon, to wit on &c., a writ of error was duly issued out of Chancery, reciting the said affirmance of the said judgment, and commanding the Chief Justice of the King's Bench to send the record and process of the said plaint into Parliament, &c.; that the last-mentioned writ of error was afterwards duly allowed, and was a *supersedeas* to all writs of execution. That the record and process was afterwards, to wit on &c., duly certified, together with the said writ, to the Queen (after the demise of the late King) in Parliament; as by the same, in the hands of the proper officer of Parliament *in that behalf, reference being had thereunto, will fully and at large appear; and which the said last-mentioned writ of error is now in full force and effect, and the proceedings thereon pending and undetermined. Verification and prayer of judgment that defendant ought to be admitted to plead, &c.

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Similar rejoinders to the replications to the second and third pleas.

General demurrers to each of the rejoinders; and joinder in demurrer.

At the sittings in Banc in last Hilary Vacation (1), 1st February, the demurrers were argued by

Cresswell, for the plaintiff :

The questions raised upon the record are, whether the recovery in ejectment be pleadable as an estoppel, in reply to the pleas of *liberum tenementum*, and "not possessed:" whether the effect of the estoppel is defeated by the pendency of a writ of error: and, whether the plaintiff must have been put into actual possession by entry, or writ of *habere facias possessionem*, before he can maintain an action for mesne profits.

The replication is supported by an authority expressly in point, *Nares v. Lewis*, of which the record is found in Brownlow's Entries, tit. Trespass (2), and in the Appendix to Richardson's Practice of the Common Pleas, vol. ii. p. 256 (4th ed. p. 440). The original record has been examined and found to correspond with the entries. It was an action of trespass against Elizabeth Lewis for mesne profits from 2nd October, 32 Car. II., to 4th March, 35 Car. II. The defendant pleaded that she entered by command *of persons who were seised in fee of the premises, and gave express colour to the plaintiff. The plaintiff replied, by way of estoppel, that he had, in

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(1) Before Lord Denman, Ch. J., (2) Brownlow, Latin Redivivus, Littledale, Williams, and Coleridge, JJ. p. 493 (ed. 1693).

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Hil. 32 & 33 Car. II., brought an action of *ejectione firmæ* against the defendant and others on a demise to him of the same premises by B. G. for the term of five years on 1st of October, 32 Car. II.; that defendants had pleaded Not guilty, on which issue was joined, which was found for the plaintiff, who thereupon had judgment to recover possession of his term. To this replication the defendant demurred. Judgment was given in the Common Pleas for the plaintiff; and the judgment was afterwards affirmed on error in this Court. The only difference between the two cases is, that the defendant there gave express colour; here the possession is traversed in one plea, and implied colour is given by the other plea of *liberum tenementum*. The law of estoppel is clearly stated in the judgment of Lord ELLENBOROUGH in *Outram v. Morewood* (1): "a recovery in any one suit, upon issue joined on matter of title, is equally conclusive upon the subject-matter of such title;" and "a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession." His Lordship then cites a case from Leonard (2), where the defendant, in an action of trespass *quare clausum fregit*, pleaded a former recovery in an *ejectione firmæ* brought by himself against the plaintiff for the same land, and the plea was held to be an estoppel, for that the possession was bound by the recovery. So here the right of possession has been determined between these parties, *and the defendant can no longer dispute it by either of his pleas. *Trevivan v. Lawrance* (3) also illustrates the law of estoppel, and explains some apparently discordant authorities by showing under what circumstances the jury are bound by an estoppel.

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Then does the pendency of a writ of error alter the case? Until actual reversal, the judgment is in full force, and the replication is strictly true in every part. If it be reversed, the plea of course becomes false, and the estoppel fails; but in the mean time the possibility of reversal cannot affect the present validity of the judgment. Thus debt lies on a judgment pending a writ of error brought upon the same judgment: Year Book, 18 Edw. IV. f. 6, B. pl. 33; *Dighton v. Granvil* (4). It was said in the latter case that a writ of error is not pleadable, even in abatement, to a *scire facias* upon a judgment. If, then, it will not suspend the effect of

(1) 7 R. R. 473 (3 East, 346).

(3) 1 Salk. 276.

(2) *Anon.* 3 Leon. 194.

(4) 4 Mod. 247.

a judgment, à fortiori it is no bar to it. The same point was decided in *Snook v. Mattock* (1) and *Godwin v. Goodwin* (2). In *Donford v. Ellys* (3) the Court refused to stay proceedings in an action for mesne profits, pending error in the action of ejectment; and rightly, for the plaintiff's remedy should not be put in peril by the contingency of the death of parties, or of witnesses, or other accidents which may occur during the delay. It is true that the writ of error is a *supersedeas* of execution; but that is only by the practice of the Courts, and not by any rule of law; for the Courts will sometimes permit execution to be issued, as where the writ of error appears to be brought for delay: *Kempland v. Macauley* (4). **Meriton v. Stevens* (5), and *Taswell v. Stone* (6), also show that this practice is founded on the equity of the Court. Nor will any inconvenience follow from the reversal of the judgment in ejectment, for the defendant may be relieved, either by applying to this Court to stay execution, or by a writ of *auditâ querelâ*.

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The objection that the plaintiff has not obtained actual possession, or sued out a writ of *habere facias possessionem*, is entitled to no weight; for the plaintiff in ejectment may have a right to the profits without the possession. If the plaintiff had been tenant *per autre vie*, and the life had dropped, he could not have obtained possession, but would have had a right to the mesne profits. In the old action of *ejectione firmæ*, where the plaintiff sued for his term and damages, he might have damages without the term: 7 Edw. IV. 6 (7), cited Bro. Ab. Quare ejecit infra terminum, &c., pl. 6, *Peto v. Chcey* (8). So, in the modern action of ejectment, when the term expires, the plaintiff may have damages without possession: *Thrustout d. Turner v. Grey* (9), *Doe d. Morgan v. Bluck* (10). So, in the analogous case of a writ of waste, the plaintiff may be entitled to damages, where he cannot have the place wasted: Co. Litt. 285 a.

Wightman, contra:

The replication is no estoppel. It is no answer to the first plea denying the plaintiff's possession, because the recovery and

(1) 5 Ad. & El. 239.

(6) 4 Burr. 2454.

(2) 20 Vin. Abr. 69. *Supersedeas*
(B) pl. 12.(7) See *Doe d. Poole v. Errington*,
40 R. R. 415 (1 Ad. & El. 750).(3) 12 Mod. 138. *S. C.* as *Tonford*
v. —, Comb. 455.

(8) 2 Brownl. & G. 128.

(4) 4 T. R. 436.

(9) 2 Stra. 1056.

(5) Willes, 271.

(10) 14 R. R. 804 (3 Camp. 447).

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judgment in ejectment *did not vest the possession in the plaintiff, but only entitled him to obtain it by a writ of possession, which was never sued out. The rejoinder distinctly states that no execution ever issued, and that the plaintiff never was in possession of the premises. The consent rule no doubt confessed the possession, but that is no part of the record. If, then, the plaintiff has not been in actual possession since the recovery in ejectment, this action, which is founded on possession, will not lie. It would, indeed, have been enough, if the plaintiff had been let into possession voluntarily by the defendant: *Calcart v. Horsfall* (1); but possession is at all events essential. *Fenwick v. Grosvenor* (2) illustrates the principle. *Doe v. Huddart* (3) only decides that the record of a recovery in ejectment is not conclusive evidence of title in an action for mesne profits; though it was certainly intimated by the Court that, if it be available at all by way of estoppel, it must be specially replied.

Then, as to the plea of *liberum tenementum*, there is this additional difficulty, that the plaintiff sets up his judgment to recover a term as an answer to a claim of the freehold. The plea and the replication are therefore not *ad idem*. The defendant may be estopped from denying that the plaintiff is entitled to a term; but a term or lease to the plaintiff, though pleadable in reply by way of confession and avoidance of a claim of freehold, cannot estop the defendant from asserting such claim.

(LITTLEDALE, J.: The term is not derived from the defendant, but a third party, whose title has been established as against the defendant.)

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It does not appear whether the title of both the lessor and the plaintiff *may not have been derived from the defendant; but, at all events, the plaintiff established nothing but a right to recover a term, which is consistent with the title pleaded by the defendant. *Taylor d. Atkyns v. Horde* (4) settles the principle of the modern action of ejectment, and shows that the judgment is "a recovery of the possession (not of the seisin or freehold), without prejudice to the right, as it may afterwards appear, even between the parties." He who enters under it can only be possessed "according to the right" (5). A judgment in ejectment cannot be pleaded at all, in

(1) 4 Esp. 167.

(2) 1 Salk. 258.

(3) 2 Cr. M. & R. 316.

(4) 1 Burr. 60, 114.

(5) *Id.* p. 144.

any shape, either by the defendant or the plaintiff, in a second action of ejectment for the same land. It is not even evidence in a second action. If, indeed, a plea of *liberum tenementum* had been pleaded to the action of ejectment, and the issue on it found for the plaintiff, he might then have replied it by way of estoppel in this action.

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(COLERIDGE, J. : The verdict and judgment show a right of possession in the plaintiff: the plea of *liberum tenementum* asserts a right of possession in the defendant: has not the plaintiff a right to say, "this question has already been settled between us in the former action?")

The estoppel must be of something directly in issue. Here the right to the freehold is alleged. In ejectment, the right to the possession alone was determined. The precedent cited from Richardson's Practice is unsatisfactory, because no grounds of the judgment appear in any report of the case; nor are the pleadings exactly the same, for the plea there states a seisin in fee, and an actual possession of the persons so seised, by entry. The issue, therefore, went to the possession.

There are further objections to the replication. The *declaration complains of an expulsion, and appropriation of the mesne profits from 10th July, 1826, down to the commencement of the suit. The replication alleges a recovery on two demises, one on 10th July, 1826, for fourteen years, the other on 26th December, 1831, for seven years. In this there is repugnancy as well as uncertainty. The recovery of the last term of seven years only shows a possession or right of possession on 26th December, 1831, and is therefore no answer to so much of the pleas as denies possession, or right of possession, during the period between that time and July, 1826.

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(COLERIDGE, J. : The judgment is for recovery on both terms.)

Estoppels are to be construed strictly; and the plaintiff ought to show on which of the terms he relies. Besides, in point of form, although the premises, included in the two demises, are the same in name, viz., the manors of H. and T., yet they are alleged in the declaration in ejectment to be "other" manors and premises. It is, therefore, not clear that the replications cover the whole period to which the pleas apply. The pleas apply to the

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period between July, 1826, and the commencement of this suit. The recovery in ejectment, without actual entry, at most only estops the defendant from denying possession for the period mentioned in the declaration in ejectment, and the replication is, therefore, not co-extensive with the first plea. That declaration asserts a possession under the first demise from 1826 till ouster in 1831, which is inconsistent with the continued expulsion of the plaintiff from 1826, as alleged in the present action.

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Supposing, however, that the replication is good, the pendency of a writ of error is an answer to it. It would, indeed, be a singular state of the law, if a judgment *should be held conclusive, the validity of which is actually in question in a court of error. The effect of the rejoinder is, not to deny the existence of the judgment, but to stay its operation during the pendency of the writ of error. Any averment may be made in answer to an estoppel, which does not impugn the record, and which only goes to the operation of it: *Hynde's* case (1). That the Court may interfere in a summary manner, is no reason why the defendant should not also avail himself of the same matter by plea; and convenience is in favour of the practice. The case chiefly relied on is *Dighton v. Granvil* (2), which is not reported with sufficient clearness to be entitled to much weight. Some of the reasoning, attributed to the Court in it, is at variance with the judgment stated to have been given; and the decision seems to have gone on technical grounds.

(LITLEDALE, J. referred to Com. Dig. Pleader (2 W. 36).)

One distinction between this and the cases cited on the other side is that, at common law, there was no remedy to recover on a judgment after a year and a day, except by action; so that, if the defendant could delay execution by a writ of error for more than a year, he might defeat the judgment altogether. A judgment, until affirmed, ought to be no estoppel, on the same principle that a verdict, until judgment, is inadmissible as evidence: B. N. P. 284. Pendency of error is often pleadable. Thus bail cannot be fixed, pending error; and they may plead it in bar of a *scire facias* on the recognisance: *Sampson v. Brown* (3). The sheriff, who executes a *fi. fa.* after notice of allowance, is liable in trespass, and the writ of error may be *replied to a justification

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(1) 4 Co. Rep. 71 b, cited 10 Vin.
421, Estoppel (A) 12.

(2) 4 Mod. 247.
(3) 2 East, 439.

under such *fi. fa.*: *Belshaw v. Marshall* (1). In *Rowley v. Raphson* (2) a writ of error was considered pleadable in bar of execution on a *scire facias*. In *Curling v. Innes* (3) the surety of a judgment debtor was allowed to plead the pendency of a writ of error on the original judgment. The hardship on the defendant will be very great, if the rejoinder is disallowed; for there will be no effective remedy by *auditâ querelâ*, if the judgment should be reversed; and the plaintiff is an ideal person, by whom the defendant cannot be reimbursed, and who can give no security for costs.

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Cresswell, in reply :

If the possibility of reversal were to be admitted as an objection to using the judgment, it would be no estoppel, even though there were, in fact, no writ of error pending at all. In *Belshaw v. Marshall* (1) the writ of error was well pleaded; for the writ of execution was superseded by it without reference to the validity of the judgment, and the plaintiff had no other remedy. *Curling v. Innes* (3) only shows that a surety is not damnified so long as the judgment remains unexecuted. *Reynolds v. Beerling* in the note to *Evans v. Prosser* (4), is an authority to show that a judgment is available as a set-off, after error brought upon it. The passage alluded to in *Hynde's* case (5) only means that the operation of an estoppel may be defeated by showing that the judgment is reversed, or that the parties are not the same. If the judgment should be *reversed, an *auditâ querelâ*, which is an equitable, remedial, writ, will afford a complete remedy, as well between parties to the record as others who are interested in it: note (1) to *Turner v. Davies* (6).

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As to the necessity of entry or execution by *habere facias possessionem*, the plea of Not guilty either denies or admits the entry alleged in the declaration. If it denies it, the verdict falsifies the plea and estops the defendant; and in either case, the entry and possession are established as against him. The possession and ouster, alleged in this action, are the same as those stated in the action of ejectment, and neither are now to be disputed. *Nares v. Lewis* (7) is distinguished from this case only by the statement of

(1) 4 B. & Ad. 336.

(4) 3 T. R. 188.

(2) Skin. 590. See observations on this case in *Snook v. Mattock*, 5 Ad. & El. 239.

(5) 4 Co. Rep. 71 b.

(6) 2 Wms. Saund. 148.

(3) 2 H. Bl. 372.

(7) 2 Richardson's P. C. P. 256 (4th ed. p. 440).

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a seisin in fee with express colour. The pleas of *liberum tenementum* and seisin in fee are put on the same footing in *Leyfield's case* (1); and neither of them requires express colour, because they are not inconsistent with a possession by the plaintiff: *Taylor v. Eastwood* (2). The plea of *liberum tenementum* admits an actual, but not a rightful, possession in the plaintiff, and asserts a right of possession in the defendant. The judgment in ejectment shows a rightful possession in the plaintiff, and is therefore inconsistent with, and an answer to, the plea. That *liberum tenementum* denies a rightful possession, is clear from the practice, before the late rules of pleading, of giving it in evidence under Not guilty. That the judgment in ejectment implies a rightful possession, and that ejectment is, in this respect, distinguishable from trespass, is shown by *Graham v. Peat* (3).

[*777] (LORD *DENMAN, Ch. J.: A judgment is no bar to any number of other ejectments by the same party for the same premises.)

That peculiarity in ejectment arises from the facility of varying the title of the plaintiff by alleging a different demise, or a demise on a different day, so that the title may be always made to appear different. But, if the second declaration exactly resembled the first, the judgment would then be pleadable. If the declaration in this case had stated the recovery in ejectment, then the pleas of *liberum tenementum*, or of Not possessed, would have been demurrable: *Kemp v. Goodall* (4), *Palmer v. Ekins* (5).

With respect to the argument that the replication does not answer the whole of the plea, it is enough to say that the plea does not answer the whole of the declaration. If the defendant is estopped as to any part, he has no right to apply his plea to the whole. The judgment is inconsistent with his plea as to part, and the whole plea is therefore shown by the replication to be bad. Until the new rules of pleading, the practice was to plead Not guilty, and the judgment was then conclusive evidence of the plaintiff's title. Since the new rules, pleas, which distinctly challenge the plaintiff's title, are put on the record; and it has therefore become necessary to reply the estoppel. The rule laid down in the *Duchess of Kingston's case* (6) is not at variance with

(1) 10 Co. Rep. 89.

(2) 1 East, 212.

(3) 6 R. R. 268 (1 East, 244).

(4) 1 Salk. 277.

(5) 2 Stra. 817.

(6) 20 How. Sta. Tri. 338, n.

the later decisions in *Vooght v. Winch* (1), *Magrath v. Hardy* (2), and *Doe v. Huddart* (3). They are reconciled by holding a judgment to be conclusive as evidence, where the party, who relies on it, has no opportunity of pleading it; and inconclusive, *where the party elects to refer the fact to the jury, when he might have pleaded the estoppel.

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Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the Court:

This was an action for mesne profits; the declaration, of the 13th of June, 1837, was in the common form; it laid an entry on the manors of Hornby and Tatham and other premises, and expulsion on the 10th July, 1826; the latter continued to the commencement of the action. Several pleas were pleaded; two only it will now be necessary to consider: the first denied the plaintiff's possession; the other pleaded *liberum tenementum* of the defendant during all the time in the declaration mentioned. To each of these pleas the plaintiff, by way of estoppel, replied the proceedings in an action of ejectment brought by the plaintiff on the demise of Sandford Tatham against the defendant. Two demises were laid, on the 10th July, 1826, for fourteen years, and on the 26th December, 1831, for seven years, with a single ouster on the 27th December, 1831. The plea of Not guilty, the verdict, and the recovery, by judgment, of the two terms, were then stated, with an allegation that the judgment was still in full force; and the replications, having alleged the identity of the premises so recovered with those mentioned in this declaration, conclude with praying judgment "if the defendant, during the said terms in the said record mentioned, ought to be admitted to the said plea, contrary to the said recovery, record, and proceedings."

The validity of this replication of estoppel was questioned, *independently of the rejoinder, and may be conveniently disposed of first. With regard to both pleas, that which denied the plaintiff's possession and that which asserted the defendant's freehold, the question will be, whether it discloses that those pleas seek to draw again into controversy the very point (or right) decided in the former suit. If they do, upon the plainest principles, it concludes the defendant from pleading them. And this principle was not denied in the able argument for the defendant, but only its application to the present record.

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(1) 21 R. R. 446 (2 B. & Ald. 662).

(3) 2 Cr. M. & R. 316.

(2) 4 Bing. N. C. 782.

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1st. As to the plea which denied the plaintiff's possession. Two terms, it was said, are shown to have been recovered in the ejectment; one commencing 10th July, 1826, for fourteen years; and one on 26th December, 1831, for seven years. The ouster is laid on the 27th December, 1831, and no possession appears to have been given under the judgment. But the judgment itself in ejectment does not give the possession; only the right to it by entry, or writ of *habere facias possessionem*. The plea, therefore, and the replication, are not inconsistent; and it appears by the whole record that the plaintiff has not, in fact, the possession.

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This reasoning, we think, is not sound. The plea, being pleaded to the whole declaration, must be taken, on the assumption of its being a good plea, to deny any such possession in the plaintiff as was necessary for his bringing the action at all. But, in order to bring the action, all that could be necessary, on the strictest construction, would be a possession when the alleged trespass was committed. That therefore, at least, must be taken to be denied by the plea. But the record in ejectment shows, conclusively as between these parties, *a lease of the 10th June, 1826, and a continuing possession till the ouster in December, 1831. The plea, therefore, and the replication, are clearly inconsistent; and the former seeks to re-agitate that very question which the latter shows to have been determined in the former action. The defendant's argument, indeed, proceeded on the assumption that it was necessary for the plaintiff to have actual possession at the time of bringing this action. And there are, no doubt, old authorities, not cited in the argument, which show that the disseisee could not bring trespass with a *continuando* after the disseisin before re-entry, because the freehold was in the disseisor for the whole time after the disseisin; but that, after re-entry, he should have trespass with a *continuando* from the disseisin to the re-entry: but the same authorities state that for the first trespass and disseisin the action lay before re-entry, and they give several instances where the disseisee had lost his re-entry by the act of God or the determination of his estate, in which he had the action without re-entry. See Co. Litt. 257 a, and 2 Roll. Ab. 550, 553, 554. It seems to us however not important now to follow out this inquiry, because the question is, not to what extent the plaintiff can recover damages on this record, as to which we say nothing, but whether the plea of "not possessed" must not, at all events, include the time at which the trespass

charged was committed. We think it must, and therefore, being inconsistent, to that extent at least, with the judgment set out in the replication, the defendant is estopped from pleading it.

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It was urged indeed that, viewing the replication in this way, it was open to another objection; that it did not extend so widely as the plea; because, although the *plea might refer to the time of the cause of action accruing, it also refers to the time of the commencement of the action; and, as to this last, the replication, showing no re-entry, was no estoppel. But we think this objection received a sufficient answer at the Bar. The plea is pleaded to the whole, and it is enough for the plaintiff to show that it cannot be pleadable to that. The first plea therefore seems to us to be sufficiently answered.

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2ndly. In support of the second plea it was said that there was nothing inconsistent in the allegation of the freehold being in the defendant with the recovery of a term for years by the plaintiff; for it may be, for example, that both the plaintiff and his lessor are termors under the defendant.

In order to estimate the weight of this argument, it is necessary to settle what is the true meaning of *liberum tenementum*; what it admits; and what it denies.

Now, as it is pleaded in answer to a possessory action, it must admit a possession in the plaintiff, or it would be bad, as amounting to the general issue. It must admit such a possession as would suffice to maintain the action if unanswered, or as against a wrong doer. On the other hand, it must deny a rightful possession, or it would fail as a defence to the action. In the language of pleading, it gives implied colour to the plaintiff, but asserts a freehold in the defendant with a right to immediate possession. In an ordinary case, therefore, such a plea is answered by replying a term of years in the plaintiff created by the defendant, which shows that the plaintiff's possession is not merely colourable, but rightful; or, where the declaration has been sufficiently *explicit, by taking issue on the *liberum tenementum*, and so showing the defendant to be a wrong doer.

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Now, in the present case, the replication shows that, as between these parties, it has been decided that the plaintiff is a termor, not indeed under the defendant, but under one whose title is paramount to his; that the possession therefore is a rightful one, and that the defendant has no right to immediate possession: but this is inconsistent with the limited admission of

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the plea and the title set up by it, taken together. And therefore we think the defendant was estopped from such plea.

Mr. Cresswell cited, in support of the replications to both pleas, the case of *Nares v. Lewis*, which is to be found in 2 Richardson's Practice, 256 (4th ed. p. 440), and Brownlow's Entries, 493; and he has procured us a transcript of the whole record from the Treasury, the judgment not appearing in Brownlow. The declaration was in trespass, and for the mesne profits. The plea set out a title in the defendant in fee, giving express colour to the plaintiff. The plaintiff replied, by way of estoppel, the proceedings in a former action of *ejectione firmæ* against the defendant and others, in which judgment had passed for him to recover his term in the same premises; but, as in the present case, the replication said nothing of any re-entry, or delivery of possession. The rejoinder maintained the title in the plea, to which there was a general demurrer, and after several continuances it appears that judgment passed for the plaintiff. Substituting a freehold for a fee simple, this case is precisely the same as the present as far as regards the point already considered, and is an authority in support of our opinion.

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The replications being good by way of estoppel, the remaining question is, whether the rejoinders avail to destroy their effect; and these allege the pendency of a writ of error on the original judgment in the House of Lords; and we are clearly of opinion against the defendant on this point. The authority cited by *Mr. Cresswell* from the Year Book, 18 Edw. IV. f. 6 B. pl. 33, is very direct and satisfactory; and to this, and other cases cited at the Bar, may be added those of *Taswell v. Stone* (1) and *Benwell v. Black* (2), because they illustrate the distinction taken between the mere maintenance of the action on a judgment, pending a writ of error to reverse it, and the proceeding to execution upon a judgment recovered in such second action; in the former case, the Court being clear that there was no reason to set aside the judgment, but thinking it highly proper to stay any proceeding to execution upon it.

Upon the whole, therefore, we give judgment for the plaintiff.

Judgment for the plaintiff.

(1) 4 Burr. 2455.

(2) 3 T. R. 643.

UTHER v. RICH (1).

(10 Adol. & Ellis, 784—792; S. C. 2 P. & D. 579.)

1839.
June 22.

[784]

To assumpsit on a bill of exchange, drawn by defendant, indorsed by him to H., and by H. to plaintiff, defendant pleaded that he indorsed in blank, and never delivered the bill to H., but delivered it to L., who, till H. became possessed, held it for the sole use of defendant, and for the specific purpose that he, L., should get it discounted for, and pay the proceeds to, defendant; that L., fraudulently and covinously, in violation of good faith, and contrary to the said purpose, delivered the bill to H., and H. took it, without discounting for defendant, contrary to the said purpose, and in breach and violation thereof, to wit for the purpose and under colour and pretence of securing an alleged debt from L. to H.; that H. was not a *bonâ fide* holder for value or consideration, and that plaintiff was not at any time a *bonâ fide* holder for value or consideration; and that defendant never had received consideration or value from L., or H., or plaintiff, or any other, for the indorsing or payment of the bill. Replication *de injuriâ*.

Held that, on this issue, the question as to plaintiff was, whether he gave any value for the bill, and that, if he did, he was entitled to the verdict, though the circumstances of the fraud alleged might in other respects be true, and the plaintiff privy to them; for that the denial of his being a *bonâ fide* holder for value, as here worded, did not raise the question of his privity to the fraud.

ASSUMPSIT on a bill of exchange, dated 27th September, 1836, for 300*l.*, at twelve months after date, drawn by defendant on Lord Arthur Chichester, payable to order, and indorsed by defendant to John Hunter and by John Hunter to plaintiff: averment that the drawee did not pay at maturity, and that defendant had notice. Breach, non-payment by defendant.

Second plea. That the indorsement of the said bill in the declaration mentioned, by defendant, was an indorsement in blank, and that defendant never delivered the bill to Hunter, but that he delivered the same to one Lewis Levy, and the said Lewis Levy then received, and, from thence until Hunter, as hereinafter mentioned, first became possessed thereof, held the same, for a specific purpose, for the sole use and benefit of defendant, and not otherwise, to wit for the purpose and in order that Levy might get the bill discounted for defendant, and deliver and pay the proceeds thereof upon such discounting to defendant. Averment that Levy, fraudulently and covinously, in violation of good faith, and contrary to the said purpose for which he received the said bill, afterwards, to wit on &c., delivered the

(1) See the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 90, and summary of the law, per Lord BLACK-
BURN in *Jones v. Gordon* (1877) 2 App. Cas. 616, 629.—R. C.

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bill to *Hunter, and Hunter then took and received the same from Levy, upon other and different terms, and without discounting the same for defendant, and contrary to the said special purpose, and in breach and violation thereof, to wit for the purpose, and under colour and pretence, of securing a certain debt then alleged to be due from Levy to Hunter. That "Hunter was not at any time a *bonâ fide* holder of the said bill of exchange for value or consideration in that behalf given, and also that the plaintiff was not at any time, nor now is, a *bonâ fide* holder of the said bill of exchange for value or consideration in that behalf given;" that defendant never hath received any consideration or value whatsoever from Levy or Hunter, or plaintiff, or from any other person whatsoever, for the indorsing or for the payment of the bill by him the defendant. Verification.

Replication, *De injuriâ*, and issue thereon.

There were other issues of fact.

On the trial before Lord Denman, Ch. J., at the Middlesex sittings after Hilary Term, 1837, it appeared that Levy, mentioned in the plea, was introduced to the drawer (defendant), and the drawee, as a person who could raise money for them, and it was agreed that defendant should draw upon the drawee, and indorse, and the drawee should accept, bills to the amount of 1,800*l.*, which Levy should get discounted. The bills, including that on which the present action was brought, were drawn, indorsed, and accepted accordingly, and handed to Levy; but neither the drawer nor drawee received any money for them; and Levy afterwards returned several of the bills. Levy handed the bill now sued upon to Hunter, receiving for it from him 75*l.* in cash, and two acceptances for 25*l.* each. Hunter *indorsed the bill to the plaintiff, a gunsmith, from whom he received guns for it, said to have been estimated, between them, at 150*l.*, and an acceptance for 150*l.* which was afterwards paid. Hunter afterwards sold the guns for 50*l.* to a pawnbroker. Upon this and other evidence, the defendant's counsel contended that the plaintiff was privy to a fraud on the drawer and drawee, and therefore was not a *bonâ fide* holder for value: but the LORD CHIEF JUSTICE told the jury that, upon the issue on the second plea, their verdict must be for the plaintiff, if they believed that he had really given any value for the bill. Verdict for the plaintiff on all the issues.

In Easter Term, 1837, Sir W. W. Follett obtained a rule for a new trial, on the ground of misdirection as to the issue on the

second plea, and of the verdict being against evidence on one of the other issues. In Michaelmas Term last (1),

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Platt and Knowles showed cause :

It is not disputed that Hunter gave some value to Levy for the bill ; and, therefore, unless the issue upon the second plea raise the question of fraud, it must be found for the plaintiff. The question might have been raised, but is not. It will be said that the words “ *bonâ fide* ” do put in issue the honesty of the transaction ; but the allegation in the plea is, that the plaintiff was not a *bonâ fide* holder for value. Now it is true that, at one time, the principle was adopted that a party taking a bill is bound to use due diligence in inquiring whether the party *giving it has come by it fairly : *Gill v. Cubitt* (2), *Down v. Halling* (3), *Beckwith v. Corral* (4). But those cases are now overruled : *Goodman v. Harvey* (5). Illegality or fraud, since the new pleading rules, must be distinctly put on the record, that the plaintiff may know specifically what is charged, and may answer the allegation in terms. That a party was not *bonâ fide* holder for consideration may be evidence of fraud : but it is not in itself fraud ; just as “ gross negligence may be evidence of *mala fides*, but is not the same thing ; ” per Lord DENMAN, Ch. J. in *Goodman v. Harvey* (5). Fraud, therefore, is not here averred. In *Bramah v. Roberts* (6) it was held that, where a plea alleged that the holder knew a bill to have been fraudulently negotiated and no value given for it, the holder might reply generally that he had no knowledge of the fraud, and that the bill was indorsed to him for a valuable consideration. That case shows the proper way of raising and meeting the defence. There the language of the replication (independently of the denial of notice) was that the “ bill was indorsed and delivered to the plaintiffs fairly and *bonâ fide*, and for a good and valuable consideration ; ” and this averment TINDAL, Ch. J., treats (7) as simply an allegation that there was good consideration for the indorsement. The defendant here, on the second issue, might have shown that the consideration was merely colourable, as in *Devas v. Venables* (8) : but he could not go into any other question of fraud.

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(1) Monday and Tuesday, November 19th and 20th, 1838. Before Lord Denman, Ch. J., Patteson, Williams, and Coleridge, JJ.

(2) 3 B. & C. 466.

(3) 4 B. & C. 330.

(4) 3 Bing. 444.

(5) 43 R. R. 507 (4 Ad. & El. 870).

(6) 1 Bing. N. C. 469.

(7) 1 Bing. N. C. 478.

(8) 3 Bing. N. C. 400.

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Sir W. W. Follett and W. H. Watson, contra :

If the plea does not raise the question of fraud with sufficient distinctness, there should have been a special demurrer.

(PATTERSON, J.: The question is, whether the allegation that the plaintiff was not a *bonâ fide* holder for value is an allegation of fraud on the part of the plaintiff: if it be, evidence of the fraud was receivable: if it be not, no demurrer was necessary, the plea presenting only a denial of the consideration.)

The words "*bonâ fide*" mean in the fair and ordinary course of business; if a value be given in bad faith, the party does not become a *bonâ fide* holder for value. Before the new pleading rules, privity to the fraud would have been a good defence under *non assumpsit*, whether value was given or not. *Gill v. Cubitt* (1) and similar cases went too far, because there more than *bona fides* was required, namely, reasonable diligence. In Bayley on Bills, p. 471 (5th ed.), it is said, "In many cases the plaintiff is compellable to prove that either he or some preceding party took the bill or note *bonâ fide*, and for value; As, in case of a bill or note originally given without consideration, and whilst the person giving it was under duress: Or in case of a bill or note obtained by fraud: Or in case of a transfer by delivery by a person not entitled to make it: As, in the instance of bills or notes which have been stolen or lost." BAYLEY, J., in *Gill v. Cubitt* (1), adopts the criterion of Lord MANSFIELD in *Miller v. Race* (2): "Here is no pretence or suspicion of collusion with the robber: for this matter was strictly enquired and examined into at the trial; and is so stated in the case, 'that he took it for a full and valuable consideration, in the usual course of business.' Indeed if there had been *any collusion, or any circumstances of unfair dealing; the case had been much otherwise." That suggests the true question, and shows what "*bonâ fide*" means in cases of this kind. Here the jury ought to have been left to find the "collusion," if they thought the facts warranted it. So far, the doctrine laid down in *Gill v. Cubitt* (1) has never been overruled. In *Lawson v. Weston* (3) there was no collusion set up; there can be no doubt that Lord KENYON would have considered that a defence. Lord TENTERDEN may, in *Gill v. Cubitt* (1), have gone too far in over-ruling that case; but it is consistent with the doctrine for which the plaintiff here contends. In

(1) 3 B. & C. 466.

(3) 4 Esp. 56.

(2) 1 Burr. 452. See p. 458.

Backhouse v. Harrison (1) PATTERSON, J., distinctly adhered to the old law on this point: and it was not impeached in *Crook v. Jadis* (2) or *Goodman v. Harvey* (3). As to the *onus* of proof, it is thrown on the plaintiff if the defendant has shown some fraud or some defect of that nature in the plaintiff's title: *Mills v. Barber* (4). The words "*bonâ fide*" have been used by the Legislature; and in *Devas v. Venables* (5) it was held that the words "payments really and *bonâ fide* made," in sect. 82 of the Bankrupt Act, 6 Geo. IV. c. 16, "imported something different from and additional to an actual payment; that the words *bonâ fide* were inserted by the Legislature to raise the question, whether the money has been paid honestly and fairly in the course of an honest transaction, and that that question ought not to be left out of the consideration of the jury." This agrees with Lord TENTERDEN's view in *Ward v. Clarke* (6).

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(The question as to the effect of evidence was also argued; and the COURT held that there must be a new trial on this point. See the judgment, *post*.)

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LORD DENMAN, Ch. J. now delivered the judgment of the COURT :

This was an action by the indorsee against the drawer of a bill of exchange. The second plea stated that the bill had been drawn and indorsed to Levy for a special purpose, who, in fraud of that purpose, had handed it to Hunter, and that Hunter handed it to the plaintiff, not for good and valuable consideration, and that the plaintiff was not the *bonâ fide* holder. The replication was *de injuriâ*. At the trial, I held that these pleadings put in issue nothing but the fact of a consideration having been given, and that the defendant was not at liberty to show that the plaintiff knew of the fraud, but should have pleaded that knowledge in distinct terms.

On the motion for a new trial, other points were disposed of; and the only question now remaining is, what meaning is to be given to the words in the plea, that the plaintiff was not the *bonâ fide* holder of the bill.

With respect to the doctrine laid down in *Gill v. Cubitt* (7) and other cases, we adhere to the more recent decisions, and to what is

(1) 5 B. & Ad. 1098.

(2) 5 B. & Ad. 909.

(3) 43 B. R. 507 (4 Ad. & El. 870).

(4) 46 B. R. 336 (1 M. & W. 425;

Tyr. & Gr. 835).

(5) 3 Bing. N. C. 400.

(6) Moo. & M. 497.

(7) 3 B. & C. 466.

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distinctly shown that concealment from them was intended at the time of the contract. *Semble*, that, even if this had appeared, there was no fraud on the landholders.

3. That the agreement was not bad on the ground of plaintiff being a peer, since it was not shown that the money was promised as a consideration for his vote being given or withheld, and he had a right in his individual character to bargain for compensation for injury to his land. But that, if it had appeared that the money was so promised, the action must have failed.

Judgment of the Exchequer Chamber affirmed in the House of Lords.

Held also, in Q. B., that a plea, that the Company had abandoned the proposed line and adopted another line which would not pass through the plaintiff's land, and that they were promoting a bill in Parliament for that purpose, was no answer to the action.

[*794]

DEBT on an agreement under seal between plaintiff and defendants. The agreement, as set forth in the declaration and upon *oyer*, recited the formation of *a Company for making a projected railway, called "The York and North Midland Railway Company;" that defendants were four of the proprietors, and that a bill had been introduced into Parliament for making such railway; that the line thereof, according to such bill and the maps and plans deposited, would pass through the estates and near the mansion of the plaintiff; that plaintiff, considering it would be an injury to his estates, was a dissentient from the undertaking, and opposed the passing of the bill; that defendants, in their individual capacities and not merely as proprietors, had proposed that, if plaintiff would withdraw his opposition to the bill and assent to the railway, they would endeavour to deviate the line proposed in the map or plan deposited for the purposes of the said bill, and would endeavour to carry such deviated line in the direction shown upon a map annexed to the agreement, so as to leave the proposed original direction at a certain point B, and return to it at A; and that, in case the bill then in Parliament should pass into law in the then session, defendants should be bound by the further stipulations and agreements in the deed contained. The count further stated, that, on condition of such stipulations and agreements being performed, plaintiff did, by the said deed, withdraw his opposition to the bill and give his assent thereto; and defendants did thereby jointly and severally covenant and agree with plaintiff that they would apply, during the then next session of Parliament, for, and endeavour to obtain, an Act to enable them to deviate their line as proposed; and furthermore that, in case the present bill then in Parliament should pass into law within the then present session, then defendants, or some or one of them, or their *executors, &c., or the said Company,

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should and would, within six calendar months after the Act for constructing the railway according to the line proposed in the then present bill should receive the Royal assent, pay to plaintiff the sum of 5,000*l.* as or towards compensation for the damage and detriment which his residence and estates would sustain from the railway passing according to such deviated line, exclusive of, and without prejudice to, further compensation to be made to him in the event of the deviated line not being ultimately adopted, and without prejudice to such further compensation to him or his tenants for any such damage or injury as thereafter expressed; and, in case the said bill then in Parliament should, within the then present session, be passed for making the railway according to the present plan, then defendants, or some or one of them, or the Company, should and would, in the then next session, apply and use their best endeavour for obtaining an amended Act for deviating the line of the railway; and, in case defendants, &c., could not obtain such amended Act during the then next session by reason of a dissolution or other inevitable obstacle, or, in that case, during the next following session, then defendants, &c., should, within three calendar months after the amended Act should have passed in the then next or following session, as the case might be, or, in the event of such Act not being obtained, within three calendar months after the attempt to obtain it should have failed, pay to plaintiff, as part of his personal estate, an additional sum above 5,000*l.*, to be fixed by certain referees therein named, by way of compensation for damage which plaintiff's residence and estate would sustain by the railway passing otherwise than according to the *deviated line, exclusive of, and without prejudice to, further compensation to plaintiff and his tenants for any such damage and injury as thereafter expressed. The agreement contained further stipulations to pay the plaintiff 100*l.* per acre used for the purposes of the railway, and to pay to him and his tenants such further compensation, for damage or injury sustained during the progress of the works, as certain referees should fix. The declaration then averred that plaintiff withdrew his opposition to the bill in pursuance of the agreement, and that the original bill passed into law during the then session of Parliament; but that, although upwards of six months had elapsed, defendants had not paid the said sum of 5,000*l.*, or any part thereof.

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Pleas, (after *oyer*). 1. That, after the agreement made, and before suit commenced, to wit on &c., the company of proprietors

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resolved to abandon, and did altogether abandon, the said deviated line, the direction of which is in the said agreement mentioned to be shown upon the map annexed to the said agreement; and, in lieu thereof, did then resolve to adopt, and did then adopt, another line for their said projected railway, in lieu of the said deviated line mentioned in the said agreement, and eastward thereof; which said newly adopted line, as being eastward of the said deviated line in the said agreement mentioned, entirely missed and is altogether out of the lands, tenements, and hereditaments of the said plaintiff, and every part thereof; and that the said Company, to wit on &c., presented a petition to Parliament to be permitted to carry the said projected railway along the newly adopted line, and are now making every exertion in their power to procure an Act of Parliament for carrying the same *along the said newly adopted line; and that, if they shall succeed in obtaining the said Act, no part of the projected railway will pass through the lands, &c., of the plaintiff, or any part thereof. Verification.

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2. That the projected railway, in the agreement mentioned, at the time of making the agreement was intended to pass through, and, according to the Act in the declaration mentioned, is intended to pass through, lands of divers individuals; and that the said agreement was made and entered into privately and secretly between the parties thereto, and without the consent or knowledge of the individuals through whose lands the said railway was so intended to pass, and was concealed from them continually until the said Act was passed; and that the agreement was not disclosed to, or known in or by, the said Parliament in and by which the said Act was so passed as aforesaid, and that the same was concealed from the Legislature during the passing of the said Act. And defendants further say that plaintiff, before and at the time of making the agreement, was, and still is, a peer of this realm (1). Verification.

Demurrer to the first plea, for that it did not appear in or by that plea whether the Company abandoned the deviated line therein mentioned before or after the passing of the Act of Parliament in the agreement and declaration mentioned; that the money stipulated to be paid by defendants was to be paid at all events within six months after the passing of the Act, and that it was no answer,

(1) It was objected to this plea that it did not allege the plaintiff to be a peer of Parliament; but, as the COURT expressed an inclination to

permit an amendment in this respect, it was agreed at the Bar that the argument should proceed as if the necessary amendment had been made.

in point of law, that, after the agreement *made and the Act passed, the Company thought fit to abandon the line. Joinder.

There was also a general demurrer to the second plea, and joinder.

The demurrers were argued in the Court of Queen's Bench in last Michaelmas Vacation (1).

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Cresswell for the plaintiff:

As to the first plea, the making of the road is not a condition precedent to the payment of the money. The consideration for the payment was the plaintiff's consent to the adoption of the original line proposed by the bill. The defendants entered into an absolute engagement to pay the money at a fixed day after the passing of the Act; and no alteration in the plans of the defendants or of the Company can now relieve them from their obligation. Suppose the defendants had agreed to pay the plaintiff a sum on a certain day in consideration of a grant by the plaintiff to them of a right of way, would it be any defence to an action for the money that the defendants had since released their right to the way? The payment is independent of the actual making of the road; and the case is within the principle of *Pordage v. Cole* (2), and the law stated, in note (4) to that case, by Mr. Serjt. Williams (3). The plea does not even show that the Company have yet obtained the necessary powers for changing the line. (He then proceeded to argue the demurrer to the second plea; but, as the same cases, with some exceptions noticed hereafter, were cited, and *the points upon this plea more fully discussed, in error, this part of the argument has been here omitted.)

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Sir F. Pollock, contra :

As to the first plea, the whole agreement has obvious reference to some line that shall pass over the plaintiff's land. The payment is "as or towards compensation for the damage and detriment" which the residence and estates of the plaintiff will "sustain from the railway passing according to such deviated line." The Company have wholly abandoned the deviated line, and every other line passing over the plaintiff's property; and an Act has since passed to remove it far away from the property (4). A new state of things

(1) November 28th, 1838. Before Lord Denman, Ch. J., Patteson, Williams, and Coleridge, JJ.

(2) 1 Wms. Saund. 319.

(3) 1 Wms. Saund. 320.

(4) Stat. 7 Will. IV. & 1 Vict. c. lxxviii. (local and personal, public).

See *post*, p. 570, *n*. This Act was passed 30th June, 1837; the plea was pleaded, 15th February, 1837. It was noticed by *Cresswell* that the Act (sect. 27) recognised and confirmed the contracts made under the preceding Act.

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has arisen, from which it is clear that the defendants can have no benefit from the agreement, and the plaintiff suffer no detriment to his estate. The case resembles the second class mentioned in note (4) to *Pordage v. Cole* (1), namely, where, though the day of payment is fixed, the consideration fails before the day arrives. If performance fails, or becomes impossible, before the day of payment, as where the consideration is the appointment to an office which is abolished by Parliament before the day, no action lies for the money. (The rest of the argument is omitted for the reasons already mentioned.)

Cresswell, in reply, was stopped by the Court, as to the first plea.

[800] LORD DENMAN, Ch. J. :

We think there is nothing in the first plea. As to the second plea,

Cur. adv. vult.

LORD DENMAN, Ch. J., in Hilary Term (January 31st), 1839, delivered the judgment of the Court :

This case was argued in the sittings after last Term upon demurrer to the pleas. (After stating the declaration, his Lordship continued as follows :)

To this declaration, after setting the agreement out on *oyer*, the defendant first pleaded a plea which we thought bad for reasons assigned during the argument.

More difficult and more important questions arise upon the second plea. This plea seeks to avoid the deed on three several grounds. First, that the railway at the time of making the agreement was, and by the bill now passed is, intended to be carried through the lands of divers individuals, and the agreement was entered into secretly without their knowledge. Secondly, that the agreement was not known to Parliament, and was concealed from the Legislature during the passing of the Act. And, lastly, whatever might be the character of such an agreement if made between the defendants and any other than a peer or member of the Legislature, that the plaintiff's quality as a member of the Upper House, and the duties incumbent on him as such, made it at all events an illegal agreement for him to enter into, and one which he cannot enforce. This plea is demurred to generally ; and it was

contended, in the argument, that on neither of these grounds could the agreement be impeached. We think that, the plea and agreement being taken together, an answer to the declaration is *disclosed, on the ground that the latter had in contemplation that which was inconsistent with material allegations in the preamble and provisoes in the clauses of the intended bill, and that to conceal such an agreement from the Legislature was in the eye of the law a fraud upon it, and any contract founded on such concealment contrary to good faith.

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Whether an agreement of this sort, apart from the accident of concealment, must be necessarily invalid in itself, we need not decide. A state of things may perhaps be easily imagined, in which, from new information obtained after the first line had been applied for, it would become just, as well as expedient, to substitute another for it. But the question is, whether such a change can lawfully be made during the progress of the bill, by a secret compact between the future Company and certain individuals. Now the line by which a railway is to pass is at the very root of the whole project. Alter that line, fresh notices, fresh plans, fresh consents become necessary. Had the proposed deviation been introduced into this bill, it could not, under ordinary rules, have passed in that session. Suppose then that this agreement had been disclosed to Parliament, is it clear that the bill would have been allowed to pass in its present state? On the contrary, is it not at least equally probable that some such objection as the following might have prevailed? "You come to us for powers which you do not mean to use; you offer evidence in support of the preamble, and desire us to find it proved, when it is at the same time clear, from your own deliberate agreement, that another line is preferred and intended to be adopted by you; if you are not as yet in a condition to ask us to legislate on that line, it is fitting that we *should suspend legislating altogether, until we can have your whole plan before us at once." Now, if it is in any degree reasonable to suppose that the Legislature might have proceeded on such grounds as these, we think it clear that the agreement ought to have been disclosed, and that to conceal it was a legal fraud, because it was concealing that which might have made the decision other than it was. Acts of this kind, it is well known, are to be considered as bargains between the public and the parties applying for them, and the Legislature represents the public in framing them; it is essential, therefore, that nothing be knowingly

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kept back which may reasonably be expected to have an influence on the judgment of the Legislature in so framing them as to secure for the public the best terms in return for those powers over private property, and other advantages, which the Act is to confer on the parties applying. Upon principle, therefore, we are of opinion that this agreement, under the circumstances of concealment disclosed by the plea, cannot be enforced. But it has been twice under the consideration of a court of equity; and two other cases in equity, supposed to bear upon the point, were cited in the argument: it is necessary for us, therefore, to see how the point stands upon authority. The present defendants, it seems, filed their bill praying, among other things, that this agreement might be declared to be void, and delivered up to be cancelled, and the present plaintiff enjoined from proceeding in this action. The bill was demurred to generally for want of equity: in the argument before Lord Langdale, the same three objections to the agreement were insisted on, as this plea discloses: the judgment proceeded entirely on the second, the same which we have been *considering; and upon that ground Lord LANGDALE said, he saw very strong reasons to think that, when the proper time came for deciding it, the contract might be considered and held to be illegal; he, therefore, overruled the demurrer: *Simpson v. Lord Howden* (1). This decision, however, was reversed, on appeal, by the LORD CHANCELLOR, *Simpson v. Lord Howden* (2), not upon grounds which impeached the reasoning or opinion of the MASTER OF THE ROLLS, but upon a point which he had disposed of in a very few words, that the objections made to the agreement were all apparent on its face, and available in a court of law, and that there was no instance in which a court of equity had given relief under such circumstances. Some expressions, however, are reported to have fallen from his Lordship from which it may be probably inferred that he at that time considered the reasoning of the MASTER OF THE ROLLS as inconclusive; but there is nothing which approaches even to a formed opinion on the subject.

Two other cases were cited. The first is, *The Vauxhall Bridge Company v. Earl Spencer* (3). The subject of discussion, there, was an agreement made before the passing of the Vauxhall Bridge Act, between the projectors and the trustees of the Battersea Bridge: clauses to indemnify the latter for losses which they might

(1) 1 Keen, 583.

(2) 3 My. & Cr. 97.

(3) 2 Madd. 356; and, on appeal, Jac. 64.

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sustain by the erection of the new bridge had been introduced into the bill, but they were objected to on the second reading in the Lords, and the bill was in consequence withdrawn. This agreement was then secretly made, by which a sum of money was to be secured, and ultimately made payable to the proprietors *of the Battersea Bridge, in lieu of the indemnity intended to have been given by the clauses in the bill. These were then expunged, and the bill presented and passed without them. It is unnecessary to notice some difference of facts which exists between the two cases, because it does not affect the ground of the VICE-CHANCELLOR's (Sir T. PLUMER's) decision, which directly applies to the present question. He says (1), "The Legislature and the public must have supposed the claim of compensation was given up, and that the money to arise from the tolls was to be applied as the Act directs, and not in discharge of the money secured by this secret agreement. If the compensation had been publicly insisted upon, the Legislature might have passed the bill without regarding the claim, or if they thought it a proper claim, might have refused to pass the bill, on the ground that the satisfaction of the claim would be too great a burthen upon the undertaking. The object of the agreement was to prevent an opposition to the bill in Parliament, and it was to be concealed from the Legislature. Such an underhand agreement was a fraud upon the Legislature, and contrary to principles of public policy. The contract was invalid." The decree, however, which his Honour pronounced after this strong expression of opinion, did not decide on the invalidity of the bonds given in pursuance of the agreement, but left that to be tried at law. There was an appeal, and Lord ELDON (2) affirmed the decree. In the course of his judgment, however, he is reported to have made some remarks from which it appears that, in the view which he took of the facts, he doubted of the soundness of Sir T. PLUMER's reasoning. But it is *remarkable that, as he stated them, he seems not to have adverted to that circumstance of purposed concealment from the Legislature on which Sir T. PLUMER had laid so great stress, and that he certainly supposes a state of things before the Lords, on the second reading, very different from that alleged in the plaintiff's bill and admitted by the demurrer. By the bill, it appeared that several Lords "entertained objections," especially to the clauses in question, "on the ground that such a contract was illegal and contrary to public

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(1) 2 Madd. 367.

(2) Jac. 64.

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policy, being founded on an improper principle, and was likely to operate as a bar to the general improvement of the country" (1). This Lord ELDON is made treat as "something that fell from some member of the committee," as an imagination "that scruples would be entertained;" and an objection, made by one member of the committee, "not sanctioned or known by the House at large" (2). With all the respect which we unfeignedly feel for the decisions of that most able and cautious Judge, we are compelled to say that the reasoning which he is stated to have used, even on his own view of the facts, appears to us to be wholly inconclusive. "It is argued," he says, "that this was a fraud upon the Legislature, but I think it would be going a great way to say so, for *non constat*, if it had been pushed to the extent of taking the opinion of the House, that it might not have passed the bill in its former shape." But, if the House might have refused to pass it in that shape, which is *à priori* equally supposable, and which the particular circumstances alleged make more probable, and if they were the constituted judges to determine whether they would or no, and, still further, if the parties applying *for their decision knowingly withhold from them material facts, we are at a loss to understand how the possibility of a decision the same way, even with those facts apparent, removes the imputation of fraud, or the objection on the score of public policy.

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One case remains to be noticed, that of *Edwards v. The Grand Junction Railway Company* (3). The facts of that case, so far as they bear on the present point, were these. The line of an intended railway was to cross a turnpike road. The trustees opposed the bill, and prepared a petition to the Lords against it. Subsequently a meeting took place, and clauses were agreed on to be introduced into the bill, which were satisfactory to the trustees, and on the faith of which they agreed to withdraw their petition. It was then suggested, on the part of the railway, that, as the introduction of the clauses into the bill would occasion delay and expense, the trustees should accept an agreement embodying their substance in lieu of them. This was yielded to, and the bill passed without them. The question was whether this agreement was binding; and both the present VICE-CHANCELLOR and LORD CHANCELLOR held that it was. That case, however, is obviously distinguishable from the present. In the first place the bill, as it passed, contained

(1) 2 Madd. 357.

(2) Jac. 68.

(3) 43 R. R. 265 (1 My. & Cr. 650).

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nothing inconsistent with the stipulations in the agreement, a circumstance relied on by the LORD CHANCELLOR in his judgment. Secondly, if the clauses had been inserted, the opposition of the trustees, who were alone interested in them, would, *ex concessis*, have been equally withdrawn; and then, the only parties interested assenting, the bill would have passed according to the usual course of the Legislature with such bills under the same circumstances; but, as the *agreement was to effect the very thing which the clauses would have provided for, it is impossible to say the Legislature were imposed upon by it. This case, therefore, is not in point to one where the agreement between the parties and the enactments of the bill are opposed to each other. It, in fact, decided no more than this, so far as it bears on our present inquiry, that an agreement to make a particular bridge or viaduct of not less than fifty feet in width, in consideration of withdrawing opposition to a bill, one clause of which restricted the Company from making any bridge or viaduct less than fifteen feet wide, might be binding.

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It appears, then, that the conclusion to which we have come is sanctioned by the judicial opinions of Sir T. PLUMER and Lord LANGDALE; and that there is no decision, nor any clear expression of an opinion, the other way. We think there is great weight in the objection which arises to the validity of this contract from its being kept secret from the parties interested, who had given their assent to the bill which enacted a different line, and might either have withheld their assent at first, or withdrawn it and opposed the bill afterwards, if they had known of the intended deviation. But the view we have already explained renders any remarks on that, or the remaining point in the case, unnecessary.

We are, upon the whole, of opinion that the second plea is good, and there must be

Judgment for the defendants.

The plaintiff brought a writ of error in the Exchequer Chamber, on the judgment upon the second plea. The case was argued in this Vacation, Tuesday, June 18th, *before Tindal, Ch. J., Vaughan, Bosanquet, and Erskine, JJ.; Parke, Gurney, and Maule, Barons.

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Cresswell for the plaintiff in error (the plaintiff below):

None of the points made for the defendants in the Court below can be supported.

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First, it was contended that Lord Howden, being a peer of Parliament, could not legally make a pecuniary contract respecting the passing of a legislative measure. It was not denied that any individual, not a member of Parliament, might accept a compensation for abandoning his opposition to a measure which injured him; and no reason can be assigned for depriving a peer of such a right. It is not a recognised principle that a member may not vote in cases affecting his interests; if it were, no landowner could vote on the question of the corn laws, no proprietor of Bank or East India Stock on a question relating to the charters of the Bank or East India Company. But, further, it is not to be assumed that Lord Howden would give any vote at all on this question; that is not contemplated in the agreement, nor is he compellable to do so; and he does not agree to support the measure, but only to withdraw his opposition. He might, besides, cease to oppose in the character of a landowner, as other landowners might, by not instructing any agent to appear against the bill, and yet be free to decide either way, in his legislative capacity, upon a view of the public good or evil which the measure appeared to him likely to produce.

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Secondly, it was objected that, as the line was to pass through the land of other persons, it was a fraud on them to make this agreement without their knowledge. But they had no right to be privy to any terms which *an individual landowner might choose to make with the Company. If there was any obligation to communicate such a bargain to the other landowners, it was incumbent on the defendants: the plaintiff entered into no express or implied contract or understanding with any other landowners.

Thirdly, it was objected that this agreement was not made known to Parliament at the time when the Act was passed. Now the agreement is between the plaintiff and the Company; and the plaintiff has never done any thing imposing upon him the necessity of communicating with Parliament at all. The course in such transactions is, in fact, for parties to announce to the committees of the Houses that they have agreed; but Parliament does not interfere with the terms of such agreements. It is contended that, inasmuch as the agreement provides for a future deviation, the Legislature was deceived, and the plaintiff was a sharer in the deceit, because the parties had in contemplation to represent one line as the best to Parliament, and then construct another. This view seems to have been partly sanctioned by Lord LANGDALE, M. R.,

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in *Simpson v. Lord Howden* (1), where a bill was filed by the present defendants, praying to have the agreement delivered up to be cancelled, and a demurrer to the bill was over-ruled. But Lord Howden was no party to any misrepresentation; he simply assents to a proposal that he shall give up his interests in the Company's favour, on condition of a certain compensation and of an alteration to be obtained, if possible, which is to lessen the injury done to him. The not communicating such an agreement to *strangers cannot make it illegal unless it be illegal in itself: and *The Vauxhall Bridge Company v. The Earl of Spencer* (2) shows that withdrawing opposition to a bill may be a good consideration for payment to be made in compensation. Possibly, if the contract had provided for positive concealment, the objection would have been more specious. *Catlin v. Bell* (3) and *Hodgson v. Temple* (4) show that a bargain respecting goods may be enforced by a party who knew that the other party intended to smuggle them.

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(TINDAL, Ch. J.: Not if the bargain is to effect that.)

That distinction is in favour of the plaintiff. Lord LANGDALE's decision in *Simpson v. Lord Howden* (1) was reversed by Lord COTTENHAM, L. C.: *Simpson v. Lord Howden* (5). The LORD CHANCELLOR there threw doubt upon the doctrine laid down by the MASTER OF THE ROLLS on the point now under discussion; but he reversed the judgment, it is true, upon a distinct point. Suppose this contract had been made before the Act was applied for, what pretence would there have been for treating it as a fraud on Parliament? But what difference can it make that the contract was not concluded till the bill was in Parliament, the terms being the same? Or, again, suppose the Act had passed before any contract had been made, and afterwards, upon Lord Howden claiming compensation before a jury, the parties had agreed to give him 5,000*l.*, and attempt to obtain a fresh Act authorising a deviation. That transaction would have been free from the objection now made, yet the situation of all parties would have been the same as *it is now. It can make no difference whether the money be to be paid immediately, or six months after the Royal assent shall have been given. Indeed, the record does not show that the bill was before Parliament at the time of the contract. No objection can arise

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(1) 1 Keen, 583.

(2) Jacob, 64.

(3) 4 Camp. 183.

(4) 14 R. R. 738 (5 Taunt. 181).

(5) 45 R. R. 225 (3 My. & Cr. 97).

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upon the ground of public policy; the general policy of the law is, that any owner of property shall make such terms respecting the abandonment of any of his rights as may seem fit to himself and the other contracting party. Further, supposing the contract vicious, so far as regards the deviation, the other terms, which contain simply an abandonment of Lord Howden's rights for a consideration, may well stand. "If some of the covenants of an indenture, or of the conditions endorsed upon a bond, are against law, and some good and lawful," "the covenants or conditions which are against law are void *ab initio*, and the others stand good:" *Pigot's case* (1). The same rule as to conditions void by the common law is to be found in *Norton v. Simmes* (2) and *Mosdel v. Middleton* (3). It is true that if part of the consideration of a promise be against law the whole contract is void: *Featherston v. Hutchinson* (4); but here the question arises as to distinct parts of the promise itself. *Gaskell v. King* (5), *Wigg v. Shuttleworth* (6), *Howe v. Syngé* (7), illustrate this point.

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(MAULE, B.: In those cases the illegality consisted in contracting not to claim deductions in respect of the property-tax; stat. 46 Geo. III. c. 65, s. 115, enacted that "all contracts, covenants, and agreements made or *entered into, or to be made or entered into for payment of any interest rent or other annual payment aforesaid in full, without allowing such deduction as aforesaid, shall be utterly void." The particular covenant, &c., was all that the words of the statute reached.)

Kerrison v. Cole (8), *Chesman v. Nainby* (9), *Newman v. Newman* (10), are also illustrations of the general distinction.

(TINDAL, Ch. J. mentioned *Mouys v. Leake* (11).)

If the legal and illegal contracts depend one upon the other, the law no doubt is the other way; but that is not so here.

(PARKE, B.: If I sell a horse to a man who agrees to give me 50*l.* and steal another horse, am I enforcing an illegal bargain by suing for the 50*l.*?)

(1) 11 Co. Rep. 26 b, 27 b.

(2) Hob. 12; see p. 14 (5th ed.).

(3) 1 Ventr. 237.

(4) Cro. Eliz. 199.

(5) 10 B. R. 462 (11 East, 165).

(6) 13 East, 87.

(7) 15 East, 440.

(8) 8 East, 231.

(9) 2 Str. 739; *S. C.* 2 Ld. Ray. 1456; *S. C.*, in error in Dom. Proc., 1 Br. P. C. 234 (2nd ed.).

(10) 16 B. R. 386 (4 M. & S. 66).

(11) 8 T. R. 411.

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The answer to the question just put would depend upon the fact, whether the horse was given for the 50*l.* and the promise to steal, or whether the promise to steal was altogether an independent matter, and the horse was sold for the 50*l.* only. In the latter case, an action might be brought for the 50*l.*, not in the former; but the case here resembles the former. The plaintiff withdraws his opposition, and gives "his assent," on condition of the stipulations in the agreement being performed. Now the agreement contains a stipulation that the defendants will endeavour to obtain an Act authorising them to deviate. And the covenant of the defendants is that, if the "present bill" be passed in the then session, they will pay the plaintiff 5,000*l.* for compensation in respect of the railway as made on the deviated line, exclusive of other possible damages. It *cannot be said that the deviation is not a part of the contract mixed up with the whole. If the line made according to the deviation be illegal, the 5,000*l.* cannot be recovered; for it is to be paid for the damage done by that line.

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In answer to the first objection it is contended that the plaintiff had a right to bargain as to his own land, although he was a peer. But the objection is that he is selling his vote.

(ERSKINE, J. : The dissent may be merely in the character of an individual.)

He contracts, not merely to withdraw his opposition, but to "assent : " if he had voted against the bill, that would have been a breach of the contract (1).

In answer to the second objection, it is said that any party interested may individually get the best terms which he can. But, if the whole be part of a common scheme, as a railway, a secret bargain by one such party is a fraud on the rest.

(TINDAL, Ch. J. : You would compare it with a deed of composition, where the law will not permit one creditor secretly to get better terms than the others.)

It is an analogous case. If the other parties had known of these terms, they would themselves have probably made their bargains differently.

(1) On this point, *Sir F. Pollock* the words of Lord MANSFIELD in *Jones v. Randall*, Cowp. 37, 39. cited, in the Court below, *Gilbert v. Sykes*, 14 B. R. 327 (16 East, 150), and

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(ERSKINE, J.: It is not averred that any one was to know what any other gave. It is not like a case of underwriters subscribing the same policy: each may have assented on different terms.)

PARKE, B.: Under a deed of composition, each creditor is supposed to receive the same terms, and no one would join if he were told that the debtor meant to make separate bargains with each.)

[*814] All parties *are together before Parliament. The agreement is like a bargain for giving a creditor money to induce him to sign a certificate. Besides, the other parties here assent upon the belief that the railway is to follow the line preferred in the original bill, which (sect. 46) prohibits a deviation, except within small limits (1). Their consent is not stipulated for in the agreement; and it is not only possible, but highly probable, that they would have opposed the original bill had they been made acquainted with this bargain. When they have to oppose the new bill their situation is altered. The bargain is, in effect, for the misapplication of the funds.

Lastly, the transaction is a fraud on the Legislature, who are trustees for the public. It is a secret agreement to obtain the consent of Parliament on the supposition that a line is to be followed, which it is intended to abandon. *The Vauxhall Bridge Company v. The Earl of Spencer* (2) has been cited to show the legality of such a bargain. That case came first before Sir Thomas Plumer, V.-C.: *Vauxhall Bridge Company v. Earl Spencer* (3); and his Honour held the agreement to be illegal. But afterwards, when the answers were put in, the concealment from the Legislature, and agreement to conceal, were contradicted; and in that shape the case, *The Vauxhall Bridge Company v. The Earl of Spencer* (2), came before Lord ELDON, whose language, therefore, cannot apply to this case. Lord COTTENHAM's judgment *in *Simpson v. Lord Howden* (4) decides nothing as to the principle now in question; and Lord LANGDALE's opinion, in the previous case of *Simpson v. Lord Howden* (5), is expressly in favour of the

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(1) The Act is stat. 6 & 7 Will. IV. c. lxxxi. (local and personal, public), "for making a railway from the city of York to and into the township of Altofts, with various branches of railway, all in the West Riding of the county of York or county of the said city." See stat. 7 Will. IV. & 1 Vict.

c. lxxviii. (local and personal, public), "to alter the line of the York and North Midland Railway, and to amend the Act relating thereto."

(2) Jacob, 64.

(3) 2 Madd. 356.

(4) 45 R. R. 225 (3 My. & Cr. 97).

(5) 1 Keen, 583.

defendants. In *Edwards v. The Grand Junction Railway Company* (1) a private agreement to cease opposing the bill, in consideration of some advantages in addition to those given by the Act, was considered not to be illegal on the ground of injustice towards shareholders who were ignorant of the agreement. But there, as Lord COTTENHAM, L. C. pointed out, the advantage, which was the construction of a bridge wider than those which the Company were compelled to make by the Act, was consistent with it: here the contract is for a line inconsistent with the original bill.

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Cresswell, in reply :

The 5,000*l.* is not given for the damage done by the intended deviation. Lord Howden, in consideration of withdrawing his opposition, is to receive 5,000*l.* at any rate; and more if the deviated line be not adopted.

As to the word “assent,” it relates merely to the proof required by parliamentary committees respecting individual landowners.

Cur. adv. vult.

TINDAL, Ch. J., in this Vacation (3rd July), delivered the judgment of the Court :

In this case a writ of error has been brought on a judgment of the Court of Queen's Bench on a demurrer to a plea. Lord Howden, the plaintiff below, brought an action against the defendants upon a covenant contained *in a deed, by which, after reciting that a bill had been introduced into Parliament for making a railway intended to pass through the estates, and near the mansion, of the plaintiff, and which the plaintiff thought likely to be injurious thereto, and therefore he was a dissentient from the undertaking, and was about to oppose the passing of the said bill, the plaintiff agreed, on condition of the stipulations in the agreement contained being performed, to withdraw his said opposition to the bill, and assent to the railway; and the defendants, four of the proprietors of the intended railway, agreed, in case the said bill should be passed into a law within the then session of Parliament, to give 5,000*l.* to the plaintiff towards compensation for the damage he would sustain, within six months after the passing of the Act; and also agreed that they would, in the next session of Parliament, apply for, and use their best endeavours to obtain, an amended Act, for making a deviation from the line of the

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railway in a particular direction. The deed contains many other stipulations, not material to be adverted to; but it is to be observed that there is none which expressly states, or from which it can be implied, that the agreement, or any part of it, was to be kept secret. The declaration on this deed alleges that the Act passed, and that six months had since elapsed, and that the money was not paid.

The first plea states that the Company of Proprietors had abandoned the proposed line, and in lieu thereof resolved to adopt another, which entirely avoided the lands of the plaintiff; and had presented a petition to Parliament for, and were using every effort to obtain, an Act of Parliament for carrying it into effect.

[*817] To this plea there was a demurrer; and the Court of *Queen's Bench held the plea to be bad. And, on the argument before us, it was not insisted that it was a good plea. It is, indeed, beyond all question that this plea affords no answer to a covenant to pay the 5,000*l.* absolutely at the end of six months after the passing of the Act.

Upon the second plea, to which there was also a demurrer, the Court of Queen's Bench gave judgment for the defendants. (His Lordship here read the second plea, p. 558, *ante.*)

The objections founded on this plea were threefold. First, that the deed was a fraud on the Legislature; secondly, that it was a fraud on the proprietors of lands on the line of the railway; and, thirdly, that it was void because it was against law that the plaintiff, a peer of Parliament, should make a bargain which placed his private interest in conflict with his public duty.

The Court of Queen's Bench decided that the deed was invalid on the first ground, and gave no opinion upon the other two; and indeed little reliance was placed on them in the course of the argument in this Court. And we are of opinion that no one of those objections ought to prevail, and that the judgment must be reversed.

[*818] The ground upon which the deed in question was contended to be a fraud on the Legislature is this,—that the plaintiff and the defendants were to be considered as having agreed together to represent to the Legislature the line of road described in the then pending bill as the line which was to be adopted and acted upon, whilst, in truth, they intended at the time to apply for, and adopt, and act on, another, if obtained. This is the view which Lord LANGDALE inclined to think might *ultimately be taken of this transaction (1). It was also argued that Lord Howden and the

(1) *Simpson v. Lord Howden*, 1 Keen, 583.

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proprietors must be considered as having agreed to represent the proposed line of the road as the best for the public interests, though in reality they never meant to carry it into effect, and had a better in prospect. In either view of the case, the supposed fraud consists in an intention to make a false representation to the Legislature, by stating the object of the adventurers to be to carry one line into effect, and concealing the design of applying for another. In both it is essential, in order to make the deed a fraud on the Legislature, that the contract to apply for a new Act should be intended by both parties to be kept secret from it. For, if it was to be disclosed, the idea of an intended fraud upon Parliament is obviously out of the question. It is not enough that the existence of such an agreement was, at the time of entering into it, and afterwards, in fact, kept secret from the Legislature and all the world besides, by both parties. The quality of the agreement, whether fraudulent or not, must depend upon the intention of the parties to it at the time of making it; and, if there did not then exist the intention of deceiving the Legislature, by concealing from it, whilst the petitioners were asking for one set of powers, the purpose of asking afterwards for others, the agreement cannot be void, whatever imputation might rest on the conduct of the parties in making the subsequent concealment. This point appears to us to be clear; and, on looking carefully at the plea, we find that there is no averment of any such intention on the part of the plaintiff or of the defendants at the time of *the making of the agreement, or of any intention to make any untrue statement to the Legislature. It is, indeed, alleged in the plea that the agreement was secret, and was kept secret; but it is quite consistent with every averment in the plea that both parties may have been innocent of any original fraudulent understanding that the transaction should be kept secret at the time the deed was executed. As the instrument is not, upon the face of it, fraudulent, as no intention of making any false representation, or of concealing any thing, can be collected from any part of it, the facts which make it fraudulent ought to be distinctly alleged in the plea: and no such facts are alleged. The subsequent concealment from the Legislature might indeed have been used as evidence to the jury of the prior intent to conceal, if that intent had been averred; but such subsequent concealment would be evidence only, and would by no means be conclusive evidence; it cannot be used to supply the want of such a distinct averment. It is not necessary,

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therefore, to decide whether such an intention, if it existed, would have avoided the deed, and, if averred on the plea, would have made it a sufficient answer to the declaration. Now this defect in the plea does not appear, so far as we know, to have been distinctly brought to the attention of the Court of Queen's Bench; and the judgment pronounced by that Court seems to have proceeded upon an assumption of the intention of both parties to keep the whole transaction secret.

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The same observation disposes altogether of the objection to the deed on the ground that it was a fraud on the landowners. It is suggested to be a fraud, either on the ground that, if the fact of Lord Howden having *obtained apparently so large a compensation had been disclosed to the landowners, it would have induced them to insist on better terms for themselves, or on the ground that, if the intention not to act upon the powers given by the statute had been known to them, they might have made a different disposition of their lands. But, on either view, the intention to keep either one branch of the agreement or the other a secret from the landholders is essential to make the deed fraudulent; and no such intention is averred. If such intention had even existed, there would still be a difficulty in holding that the deed would be fraudulent on the ground that the supposed goodness of the bargain was intended to be concealed; for it would seem that each landowner might lawfully make the best agreement he could for himself with any company of projectors, just in the same manner as if a private individual, for any purpose of his own, were negotiating to purchase the land of the same persons. There is no common obligation on all the different proprietors to place themselves on the same footing, as there is in the case of a general composition with creditors, in which case there is sometimes an express, and generally an implied, agreement that all, or all who are not expressly excepted, shall share equally and derive an equal benefit from the estate of the insolvent. It is that agreement or understanding alone which imposes an obligation on each creditor to be in the same situation as another; and there seems no analogy between their situation and that of unconnected landowners.

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The last objection is, that the deed was illegal, as it places the private interest and the public duty of the plaintiff, as a peer of Parliament, in opposition to each other. We can have no hesitation in saying that, if *it were averred in the plea, and proved, that the sum of 5,000*l.*, or any part of it, was really paid as a

consideration for Lord Howden's giving his vote for, or withholding his vote against, the bill, and that the statement in the deed was in this respect a mere colour to conceal the real nature of the transaction, the deed would have been thereby rendered corrupt and illegal, and consequently void; and that no action would lie for any part of the money. But illegality is not to be presumed; it is to be alleged and proved when it does not appear on the face of the instrument itself. Though Lord Howden was a peer, that would not affect his right to make any bargain for the sale of his land, or for a compensation for an injury to it; if it did, a peer or member of Parliament would be placed in a worse condition than any private individual. We must presume, as there is no averment to the contrary, that his quality of peer in no way affected the bargain in question, and that he was left, notwithstanding that agreement, to exercise his free judgment, and give or withhold his vote, according to his conscience, upon the measure, when it came before him in his legislative capacity. In the absence of any agreement or understanding that the vote should be given in a particular way, the mere tendency or possible effect of such a contract on the vote of a member of either House cannot be taken into consideration.

We are, therefore, of opinion that none of the objections urged by the defendants in error can prevail; that the pleas of the defendants cannot be supported in law; and that the judgment of the Court below must be reversed.

Judgment reversed.

IN THE HOUSE OF LORDS.

[THE above judgment of the Court of Exchequer Chamber was brought, by writ of error, into the House of Lords, and argued in the presence of the Judges (1).]

The *Solicitor-General* and *Mr. Pemberton* (*Mr. J. Addison* was with them):

The question turns on the legality of the agreement. The case

(1) The law Lords present were, the Lord Chancellor, Lords Brougham and Campbell. The Judges were, Lord Chief Justice Tindal, Justices Patteson, Williams, Coleridge, Coltman, Wightman, and Oresswell; Barons Parke,

Alderson, Rolfe, and Maule. The Judges who concurred in the judgments of the Courts below are mentioned in the report, 10 Ad. & El. 798 to 808 (p. 559, *ante*).

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June 16.

House of
Lords.

Lord
LYNDHURST,
L.C.
Lord
BROUGHAM.
Lord
CAMPBELL.

[9 Cl. & Fin.
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[*66]

of the plaintiffs *in error is, that the agreement was a fraud on the Legislature and on the other landowners on the line of the projected railway. In the first place, the agreement being for a different line from the then Parliamentary line, and being secretly entered into and kept concealed from Parliament, was a fraud on the Legislature, contrary to public policy, and therefore void. Secondly, such a secret and concealed agreement for a deviated line was void, as being a fraud on the other landowners through whose lands the railway, according to the then Parliamentary line was intended to pass, and who had assented to the undertaking on the faith of the Parliamentary line being the line really intended. Thirdly, the agreement was a fraud upon the other subscribers to the railway mentioned in the bill then before Parliament, without whose privity or consent the agreement was entered into: and fourthly, it was apparent on the face of the agreement that the 5,000*l.* were to be paid in order to induce the defendant in error to withdraw his opposition, and give his assent to the bill then in Parliament; and the defendant in error being then a peer of Parliament, the agreement had an evident tendency to influence his judgment and vote in the passing of the bill, and on that ground the agreement was unconstitutional and void.

[*67]

(The learned counsel stated the course of litigation in the cause: After the action was commenced in the Court of Queen's Bench (in February, 1837), the defendants thereto filed a bill (in March, 1837) in the Court of Chancery for an injunction to stop that action, and for having the agreement delivered up to be cancelled, as being void for the reasons above stated. A demurrer was put in to that bill by Lord Howden; and the MASTER OF THE ROLLS, after hearing the argument on the demurrer, was of opinion that the agreement was *illegal, and his Lordship overruled the demurrer (1). There was then an appeal from that decision to the LORD CHANCELLOR, who in his judgment abstained from giving any opinion on the validity of the agreement, but on other grounds restored the demurrer (2), which put an end to the equity suit. The pleas to the declaration were afterwards (in November, 1838) argued in the Court of Queen's Bench, and the judgment of that Court was given on the first plea for the defendant in error, and on the second against him; the Judges there concurring in the opinion before indicated by Lord LANGDALE, that the agreement was

(1) 1 Keen, 583.

(2) 45 B. R. 225 (3 My. & Cr. 97).

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a fraud on the Legislature, and therefore void (1). The judgment of the Court of Queen's Bench, on the second plea, was brought to be reviewed in the Exchequer Chamber, and was reversed (2). The arguments and judgments referred to are so fully reported on the question of the validity of the agreement, that we deem it unnecessary to report the arguments on the present occasion. The only new authority cited in reference to that question was a judgment by Lord ELDON, given in Messrs. Mylne & Keen's report of the case of *Blakemore v. The Glamorganshire Canal Company*, Vol. 1, p. 162 *et seq.* (3); and the only new argument was a comparison of the agreement in question with fraudulent marriage bonds, and with deeds of composition with creditors, by which some would have benefits in fraud of others.)

Mr. Bethell, in the absence of *Mr. F. Kelly*, for the defendant in error, submitted that in no case was fraud to be inferred; and here, unless it appeared on the face of the instrument, the House would not strain a point *to presume fraud. The agreement upon which the action was brought was perfectly legal upon the face of it, and there was no legal obligation on the defendant in error to give notice of the agreement, either to the other persons through whose lands the railway was intended to pass, or to the Parliament by which the Act was passed. There was no attempt or intention by this agreement to deceive any person. What the parties agreed to as between themselves, with respect to the deviation in the line of railway by another cut, was for the public benefit as well as for their own, and was to be submitted to the consideration of Parliament. The question brought before the House in this case is not affected by the opinion of Lord LANGDALE, whose decision was confined to the matter of the demurrer before him; and if there was any indication of opinion by his Lordship as to the legality of the agreement, it was outweighed by the indication of opinion by Lord COTTENHAM to the contrary.

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As the counsel for the defendant in error were about to resume their argument next day,

THE LORD CHANCELLOR said :

June 16.

We have consulted the learned Judges with respect to the pleadings in this case, and they are unanimously of opinion that

(1) P. 560, *ante* (10 Ad. & El. 800).

(3) 36 R. R. 289.

(2) P. 571, *ante* (10 Ad. & El. 815).

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the question of fraud is not raised in any way upon those pleadings. There is no averment upon the face of the plea, that there was any intention, at the time when the agreement was entered into, that it should be kept concealed; and there is nothing upon the face of the agreement itself, the terms of the agreement, from which we can infer that such was the intention. We are therefore of opinion, as far as this question at least is concerned, that the judgment of the Court of Exchequer Chamber must be affirmed.

[69] LORD BROUGHAM :

I entirely agree with my noble and learned friend. I see no fraud whatever alleged on these pleadings.

LORD CAMPBELL :

I also entirely agree in the opinions expressed by my noble and learned friends. It appears to me that the question is not raised. If it were raised, I certainly should feel considerable difficulty upon it, after the doubts which have been entertained by persons of the greatest authority, upon this subject: at the same time, I must own that I have a very strong opinion that there is nothing in these pleadings, showing that Lord Howden was by this agreement positively bound to do any act which would, in the slightest degree, vary the rights of any of the parties as they were fixed by the bill which was passed, and which had received the Royal assent. Those rights must remain as they were until an application was made for another bill, and until the Legislature had passed another bill altering the provisions of the first bill. It must be presumed that justice would be done to all parties, and the agreement amounts only to this, that there would be an application made to Parliament to vary the first bill. I cannot apprehend that any circumstance of that kind could at all render illegal the agreement which the parties entered into; but it is not necessary to give my positive opinion upon that question. I concur in the opinion which has been expressed, and unanimously expressed, by the Queen's Judges, that when the pleadings are properly understood it is clear that the judgment of the Court below has been right, and that it must be affirmed.

LORD BROUGHAM :

[*70] When I stated my opinion on *the question of fraud, I looked, and I advisedly looked, into the question, beyond that which

appeared upon the record. I entirely agree with my noble and learned friends, that the question is upon the pleadings; we are disposing of the case upon the pleadings. The point of fraud is not raised upon the second plea, nor does the fraudulent concealment suggested appear upon the memorandum of the agreement set forth on the *oyer* introductory of the pleas: it is upon that ground your Lordships will be called upon to dispose of this writ of error. I would add, however, to that, that I concur in what has fallen from my noble and learned friend, though that is not now the matter for your Lordships' consideration; and I do it advisedly, and upon this ground, that unhappily one of the parties to this agreement, Lord Howden, is no more; and I feel that it is just towards his memory that he should have the benefit of, not the doubt, but the expressed opinion, which I formed upon that subject. I move that the judgment be affirmed.

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Mr. Kelly, on behalf of the defendant in error, asked for costs, and for interest from the time of the judgment of the Exchequer Chamber, under the statute.

It was ordered and adjudged that the judgment of the Court of Exchequer Chamber be

Affirmed with costs, and with interest at 4 per cent. on the 5,000l. from the date of the judgment of the Court of Exchequer Chamber.

IN THE COURT OF COMMON PLEAS.

HINCHLIFFE v. THE EARL OF KINNOUL (1).

(5 Bing. N. C. 1—26; S. C. 6 Scott, 650; 1 Arn. 342; 8 L. J. (N. S.) C. P. 105.)

In 1728 land was let on a building lease, which expired at Lady Day, 1824. In 1819 plaintiff, by virtue of a demise from an under-lessee, which expired in 1820, was in possession of a house erected on part of this land, and, under that demise, exercised, as all his predecessors had done, for more than thirty years, a right of way over a passage on one side of his house, as necessary for the use and enjoyment thereof; particularly for repairing the eastern side: the under-lessee's interest expired in 1822: defendant was in possession of the soil of the passage by virtue of an assignment, in 1791, of the lease of 1728: in 1819 the party possessed of the reversion

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[1]

(1) Cited by KAY, J. in judgment in *Brown v. Alabaster* (1887) 37 Ch. D. 490, 501, 57 L. J., Ch. 255, 257.—R. C.

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expectant on the lease of 1728 demised to plaintiff the house of which he was in possession, as above, for fifty-seven years and a half, to hold from Lady Day, 1824, together with all the appurtenances to the same belonging, subject to a covenant for repairs. In 1822 the reversioner demised the soil of the passage to defendant for sixty-one years, to hold from Lady Day, 1824: Held that, under the demise of 1819, plaintiff was entitled to a right of way over defendant's passage.

[*2]

THE plaintiff declared that he was possessed of a house in the parish of St. George, Hanover Square, in the county of Middlesex, abutting on the north on *Green Street, and on the east on a passage leading from Green Street to Lee's Mews: that there was a coal-shoot, coal-hole, or opening in the passage, communicating with a coal-cellar, parcel of the plaintiff's house; and that the coal-shoot, coal-hole, or opening was necessary for the convenient and beneficial use and occupation of the house: that a pipe, for the conveying water necessary for the convenient and beneficial use and occupation of the house, was placed through and under the passage: and that another pipe, for conveying water and soil from a water-closet in the house, was placed in and down the eastern wall of the house, which abutted upon the said passage: that the plaintiff had a right for himself and his servants to pass and repass, on foot, along the passage, for the purposes of using the coal-shoot, coal-hole, or opening; of using and filling the coal-cellar; and of cleansing, amending, altering, and repairing the pipes and side of the house abutting on the passage, at all such seasonable, convenient, and necessary times as should during his possession of the house become necessary for any or either of such purposes: that while he was so possessed, it became necessary for him, and his servants, and workmen, to pass and repass through the passage, for the purposes aforesaid; but that the defendant prevented him from having access, by closing the entrance of the passage.

In a second count, the plaintiff claimed a right or easement to pass and repass along the passage, with coals and such other things, at seasonable times, for the beneficial use and occupation of the coal-cellar; and

In a third, a right of way for himself and his servants, to pass and repass along the passage, at their will and pleasure, at all times of the year, as to the messuage necessarily belonging and appertaining, and as necessary for the full and convenient use, enjoyment, and occupation of the same, with the appurtenances.

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In the third, seventh, and ninth pleas the defendant traversed the

rights as claimed in the three counts of the declaration ; and upon those traverses the plaintiff joined issue.

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Upon these three issues it was found, by a special verdict, that the plaintiff for many years before, and on the said several days and times, when &c., in the declaration mentioned, was possessed of, and occupied the messuage in Green Street, in the declaration mentioned, under a lease hereinafter mentioned ; which messuage abutted on the north on Green Street, and on the east on the passage in the declaration mentioned, leading from Green Street to premises in the occupation of the defendant, which—at the time of granting a certain lease, hereinafter mentioned, by Robert then Earl Grosvenor to Elizabeth Hinchliffe, since deceased, and the plaintiff, bearing date the 20th of July, 1819—extended from Green Street to Lee's Mews, as in the lease described : that during all the time of the plaintiff's possession as aforesaid, and for many years antecedent thereto, there was a coal-shoot or coal-hole, covered with a moveable iron plate, in the said passage near to the eastern side of the said messuage of the plaintiff, and which said coal-shoot or coal-hole passed in an oblique direction into a coal-cellar belonging to the said messuage, and forming part thereof : that during all the time of the plaintiff's possession as aforesaid, and for many years antecedent thereto, there was a pipe for carrying water necessary for the convenient and beneficial use and occupation of the said messuage, and which was the sole pipe for the supply of water to the said premises, situate in the soil under the said passage ; and also another pipe for conveying water and soil from a water-closet, part and parcel of the said messuage, for the necessary occupation of the same ; which last-mentioned pipe, and also *part of the first-mentioned pipe, passed outside the eastern wall of the said messuage so abutting on the said passage as aforesaid ; and that the coal-shoot in the declaration mentioned was, during all the time aforesaid, necessary for the convenient use and occupation of the said messuage and premises, with the appurtenances : that the said coal-shoot could not be used without passing or repassing along the said passage : that the necessary repairs to the said pipes, and side or wall of the messuage abutting upon the said passage, could not be done without passing and repassing along the said passage : that, at the said several times, when, &c., the plaintiff had occasion to use the coal-shoot, and to repair the pipes and side or wall ; and that the defendant hindered and obstructed the plaintiff at the said several times, when &c.,

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HINCHLIFFE from passing and repassing along the said passage for the purpose of using the coal-shoot, and for the purpose of repairing the said pipes and side or wall:

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[*5]

That, by indenture of lease of 2nd October, 1728, Robert Myddleton, as committee of Dame Mary Grosvenor, widow, a lunatic, demised to Thomas Barlow and Robert Andrews part of a field, called Upper Hill Field, in the parish of St. George, Hanover Square, fronting towards the east one hundred and twenty feet on Audley Street; towards the north four hundred and forty feet on an intended street to be called Green Street; and toward the west two hundred and ten feet on another new street to be called Hyde Park Street; and abutting on the south partly on buildings leased to John Brown, and partly on an intended stable yard or mews; together with all ways, passages, lights, easements, &c.; (which parcel of ground was part of a large piece of ground agreed to be let to Barlow and Andrews by the said Sir R. Myddleton;) to hold the said piece of ground and premises *from Lady Day, 1727, unto the full end and term of ninety-seven years thence next ensuing, at a yearly rent of 4s.:

That, by indenture of lease of 22nd July, 1729, Barlow and Andrews demised to Gray and Brown a part of Upper Hill Field, fronting towards the south sixty-five feet on the said intended stable yard or mews; towards the east seventy-five feet on land in the occupation of Roger Morris; then towards the north fifty feet on land in the occupation of James Richards; then towards the east seventy-five feet on the same land; then towards the north five feet on Green Street; then towards the west seventy-five feet on land in the occupation of Robert Umpleby; then towards the north ten feet on the same land; and then towards the west seventy-five feet on land in the occupation of Richard Oakman: with free ingress, egress, and regress, along with other tenants, over the intended stable yard or mews: to hold from Lady Day then last past for ninety-three years thence next ensuing; at the rent of 10*l.* per annum:

That the part of the last-mentioned premises, described as fronting five feet on Green Street, and seventy-five feet east and west on land in the occupation of Richards and Umpleby respectively, was the soil of the way or passage in the declaration mentioned; and that the premises in the occupation of Umpleby were the premises of the plaintiff in the declaration mentioned:

That, by indenture of lease of 17th July, 1730, Barlow and Andrews demised to Robert Umpleby, part of Upper Hill Field, fronting towards the west seventy-five feet on land let by Barlow and Andrews to Thomas Parker, carpenter; towards the north fifty feet on Green Street; towards the east seventy-five feet on land in the occupation of Gray and Brown (being the way or passage before described); and towards the south, partly on land in *the occupation of Gray and Brown, and partly on land in the occupation of Oakman: to hold from Lady Day then last past for ninety-two years, at a rent of 10*l.* per annum:

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That Umpleby's interest became vested, by assignment, in Thomas Grace: that, by indenture of lease of 27th February, 1764, Grace demised the premises, together with a messuage then built thereon, and all vaults, cellars, ways, paths, passages, and appurtenances, to Samuel Adams, to hold from Michaelmas, 1761, for sixty years and a half next ensuing, wanting seven days, at a rent of 10*l.* per annum: that Adams's interest vested in Mary Forrester, widow; and that, by indenture of 29th June, 1799, the executors of Mary Forrester demised the messuage and premises, with the yard or garden and appurtenances thereunto belonging, or usually occupied or enjoyed therewith, as the same were in the occupation of Mrs. Forrester, to Elizabeth Hinchliffe, the mother of the plaintiff, to hold from Midsummer Day then last past, for twenty-one years:

That before and on the 20th of July, 1819, the reversion in fee of the premises demised by the indenture of 2nd October, 1728, was vested in Robert Earl Grosvenor:

That, by indenture of the 20th of July, 1819, the said Earl, in consideration of 1,867*l.* 16*s.*, demised to Elizabeth Hinchliffe, and the plaintiff, the piece of ground, and the messuage thereon, fronting towards the north twenty-seven feet on Green Street; and towards the east seventy-five feet on the way or passage in the declaration mentioned, leading from Green Street into Lee's Mews: together with all the appurtenances to the said piece or parcel of ground, messuage or tenement, erections, buildings, and premises belonging, or in anywise appertaining: to hold the premises, with the appurtenances, from Lady Day, 1824, at which time the indenture of 2nd October, 1728, *would end and determine, for fifty-seven years and a half thence next ensuing: Elizabeth Hinchliffe and the plaintiff covenanting to "keep the said messuage or tenement, and all other erections and buildings

[*7]

HINCHLIFFE built, or that should or might be built on the said demised ground, or any part thereof, and all the walls, pavements, fences, pipes, gutters, watercourses, privies, sinks, drains, sewers, and appurtenances belonging, or that should or might be made or belong, to the said demised premises, or any part thereof, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever :”

That Elizabeth Hinchliffe died in 1826 :

That, by indenture of 14th July, 1790, the executors of Barlow and Andrews demised to Richard Oakman a piece of Upper Hill Field, fronting towards the east seventy-five feet on the land demised to Gray and Brown, and towards the north forty feet on the land demised to Umpleby : to hold from Lady Day then last, for ninety-two years, at the rent of 5*l.* 15*s.* per annum :

That, by indenture of 15th July, 1790, the executors of Barlow and Andrews demised to James Richards the ground immediately adjoining the passage in the declaration mentioned, described as fronting Green Street for fifty feet towards the north, and towards the west for seventy-five feet, a way or passage leased to Gray and Brown, as the same was more plainly described in the scheme or plan thereof drawn in the margin of the indenture : to hold from Lady Day then last, for ninety-two years, at the rent of 10*l.* per annum :

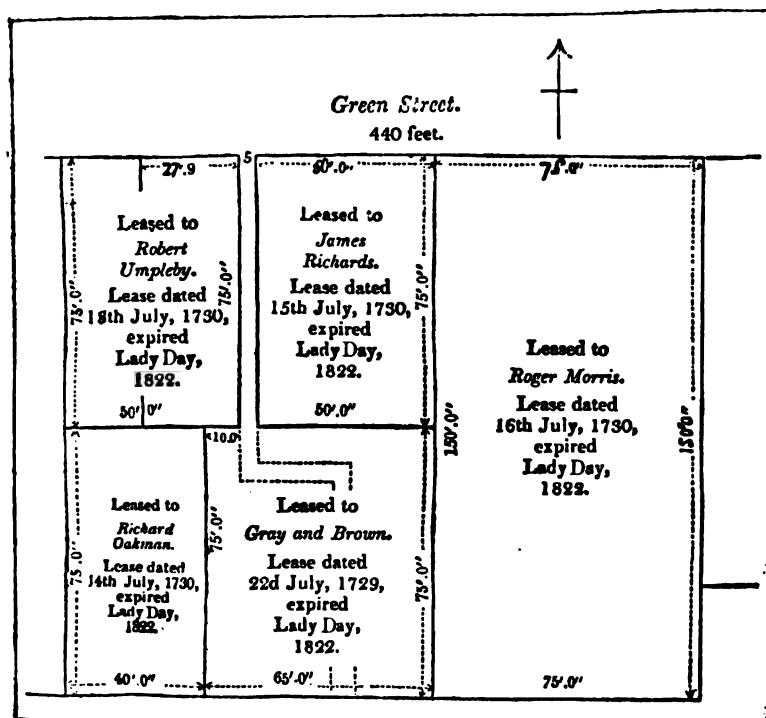
That, by indenture of 16th July, 1790, the executors of Barlow and Andrews demised to Roger Morris a further part of Upper Hill Field, fronting towards the west a hundred and fifty feet on the lands demised to Richards, and Gray and Brown, and towards the north *seventy-five feet on Green Street : to hold from Lady Day then last, for ninety-two years, at a rent of 5*s.* per annum :

[*8]

That, by indenture of 25th March, 1791, the then Earl Grosvenor and his trustees demised to Lord Hampden the pieces of ground above described as let to Morris and to Richards, with two several messuages upon them ; and the ground was described, in a plan annexed to the indenture, as abutting towards the west for seventy-five feet on the passage from Green Street to the Mews : towards the north for a hundred and twenty-five feet on Green Street ; and towards the east for a hundred and fifty feet on premises in the occupation of James Fisher : to hold from Lady Day, 1824, at which time the indenture of 2nd October, 1728, would expire, for twenty-nine years :

That, by an indenture of 28th March, 1793, Isaac Lefevre—in whom the terms created by the indentures of the 22nd July, 1729, and 14th and 16th of July, 1730, had vested—assigned to Lord Hampden the parcels of ground demised by those indentures, together with the messuages, &c., and all the estate, &c.; to hold from thenceforth during the remainder of the term of years granted by the indenture of 2nd October, 1728, subject to the indentures of 22nd July, 1729, and 14th and 16th July, 1830,

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and the performance of the covenants in the indenture of 2nd October, 1728:

That, by another indenture of 24th September, 1822, Earl Grosvenor demised to Lord Hampden the pieces of ground herein before described as let to Gray and Brown, and to Oakman, with the messuages erected on them; describing the ground, pursuant to a plan annexed to the indenture, as abutting towards the east for seventy-five feet; then towards the north for fifty feet; and then towards the east for seventy-five feet on ground *and buildings in the occupation of Lord Hampden; towards the north for five feet on Green Street; towards the west for seventy-five feet; and

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HINCHLIFFE then towards the north for fifty feet on ground and buildings in the occupation of Mrs. Hinchliffe: to hold from the 5th of April, 1824, ^{c.} THE EARL OF KINNOUL, “at which time the indenture of lease of 2nd October, 1728, would determine,” for sixty-one years:

That Lord Hampden bequeathed all his leasehold estates to his wife, and died in 1830:

[*10] That his wife died in 1833, and that her executors assigned to the defendant all the pieces of ground, *messuages, &c. demised by the indentures of 25th March, 1791, and 24th September, 1822; to hold for the said terms of twenty-nine and sixty-one years:

That in 1789, and until the year 1822, the way or passage mentioned in the indenture of the 20th July, 1819, had been used by the public as a thoroughfare to go from Green Street to Lees Mews, situate at the back of the messuage of the plaintiff, and had been paved and lighted by the parish; but that, after Lord Hampden had obtained the said reversionary lease in the year 1822, he built a coach-house and stables at the south end of the passage, a little to the south of, but free and clear from, the coal-shoot in the declaration mentioned, and thereby prevented all persons from passing through the same; and also put a gate at the north entrance of the said way or passage, which gate has been usually from that time kept locked, and the key thereof, during the time of Lord Hampden, kept by his porter, in the porter's hall, and since by the defendant or his servants: that from the year 1788, down to the time of putting up the gate, the occupiers of the messuage of the plaintiff used the way or passage for the purpose of carrying coals from Green Street to the coal-shoot, when and as the same were wanted there,—the same being done once or twice in the course of each year,—and also for the purpose of doing the necessary repairs to the pipes, and to the side or wall of the messuage of the plaintiff, abutting upon the way or passage respectively, as the same were wanted—the same having been done three times since the year 1788,—without any interruption whatsoever; and that from the time of putting up the gate, down to the time of refusal and obstruction by the defendant, as aforesaid, the plaintiff had used the way or passage for the same purposes as before, by calling at the house of the defendant *for the key of the gate, which had been thereupon delivered to him; he afterwards returning the key when the coals had been shot, and the repairs done.

[*11]

The question was, whether the plaintiff had any right of way over the passage between his house and the defendant's.

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The case was argued in Easter Term by

Wilde, Serjt. for the plaintiff. * * *

Sir W. W. Follett for the defendant. * * *

[14]

Wilde, in reply. * * *

[15]

Cur. adv. vult.

TINDAL, Ch. J. :

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This special verdict, which has been found upon the third, seventh, and ninth issues, stated in the pleadings, raises the question of the existence of the right claimed by the plaintiff in his declaration; namely, the right to pass over and upon the passage adjoining to and abutting on the plaintiff's messuage, for the purpose of using the coal-shoot placed in the passage, and filling the plaintiff's coal-cellar, being part and parcel of his messuage; and also for the purpose of cleansing, amending, and repairing the pipes for conducting water to, and carrying soil from, his said messuage, and amending and repairing the side and wall of the messuage itself abutting on the said passage.

The plaintiff rests his title to this right upon the exercise and enjoyment of it, prior to and at the time of the granting of a lease by Robert Earl Grosvenor to the plaintiff's late mother and himself, and upon the legal operation of that lease; by which lease, bearing date the 20th of July, 1819, the said Earl demised the messuage now belonging to the plaintiff by the description *therein contained, and to which it will be necessary afterwards more particularly to advert, to hold to the plaintiff's late mother and himself, from Lady Day, 1824, for the term of fifty-seven years and a half, from thence next ensuing.

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The defendant, on the other hand, contends that the right claimed by the plaintiff cannot be supported in law: for that such right, if it ever existed, was altogether extinguished by the unity of possession of the plaintiff's messuage, and of the soil of the said passage; which, as he contends, took place in the Earl at Lady Day, 1824, when the original ground lease, comprising as well the plaintiff's messuage as the said passage, and the various other adjoining messuages, expired by efflux of time, and let in the reversion of the said Earl: and the defendant further objects, that,

HINCHLIFFE unless it can pass as an appurtenant, it cannot exist at all, there
 THE EARL being no words in the lease of 1819 capable of granting or creating
 OF KINNOUL. a new right.

In order to determine the first question which has been raised between the parties, namely, whether the right claimed by the plaintiff has been extinguished by any unity of possession in the Earl, it will be necessary to ascertain precisely the legal interests of Earl Grosvenor and of the plaintiff, in relation to the messuage of the plaintiff, and also the legal interests of the said Earl and of those under whom the defendant claims, in relation to the soil of the passage of the defendant, at the time of the execution of the said lease of the 20th of July, 1819. At the time of the execution of that lease, it appears from the special verdict, that Mrs. Hinchliffe was in the actual possession and enjoyment of the messuage with the appurtenances in Green Street, now belonging to the plaintiff, under a lease granted to her by the executors of one Mary Forrester deceased, bearing date the 29th of June, 1799, and expiring at Midsummer, *1820. By this lease the executors of the said Mary Forrester had demised the messuage and dwelling-house, therein described, being the messuage in question, with the yard or garden and appurtenances thereunto belonging, or usually occupied or enjoyed therewith, as the same were late in the tenure or occupation of the said Mary Forrester: and it appears further, that Mary Forrester herself had held, by various mesne assignments, the residue of a certain lease which had been granted to one Samuel Adams, by indenture of the 27th February, 1764, in terms of description of the premises demised, not less extensive than those of her own grant. The immediate reversion expectant on the lease so made to Mrs. Hinchliffe, was therefore vested at that time in the executors of Mrs. Mary Forrester, under the said indenture of lease of 1764, which reversion expired seven days before Lady Day, 1822; and it appears from the special verdict, there was one other intermediate reversion outstanding and in existence interposed between the expiration of Adams's lease, and the expiration of the original ground lease granted by the Grosvenor family on the 2nd of October, 1728, and expiring at Lady Day, 1824, on which latter day, and not until that day, the Earl's right to the actual possession would commence.

Again, with respect to the soil of the passage adjoining the plaintiff's messuage, it appears from the special verdict, that, at the time of granting the said reversionary lease of 1819, from Earl

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Grosvenor to the plaintiff and his mother, the interest in the soil of the passage was vested in Lord Viscount Hampden, who, by indenture of the 28th of March, 1793, had taken by assignment from the party in whom the several terms were vested, as well the residue of the original lease, as of the sublease granted to Gray and Brown, so far as related to the passage in question, and certain other parts of the *premises : so that, at the time of the execution of the said lease of 1819, Lord Hampden was entitled to the possession of the soil of the said passage until Lady Day, 1824, when the original lease of 1728 would fall in, at which time, and not until which time, Earl Grosvenor would be entitled to the actual possession of such passage.

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Now the original lease of 1728 comprised a considerable tract of ground, at that time completely open and unbuilt upon ; not only the spot upon which the plaintiff's messuage was afterwards erected, but the soil of the passage adjoining thereto, upon and over which the disputed right is claimed to exist ; and over and above that, a large extent of the surrounding ground, upon which numerous houses have been subsequently erected by various sublessees : and if the Earl had made no leases in reversion prior to the expiration of the original ground lease, he would have been entitled, at such expiration, to the possession of the whole tract of land comprised therein, whether covered or uncovered with buildings, and also of all the messuages built thereon during the continuance of that lease ; and it is obvious that such unity of seisin and possession in the Earl would have extinguished all rights and easements of every kind which might have been acquired in or over any part of the soil demised, whether by grant, user, or otherwise howsoever, as between any of the sublessees, during the existence of their several interests ; so that, with respect to the plaintiff's messuage, any right or easement which the occupiers thereof might have acquired by adverse enjoyment in or over the passage in question, would, at the expiration of such original lease, have been entirely destroyed and extinguished. The Earl might have remodelled the whole of the property included in the original lease, in any manner he thought fit ; he might have relet the several houses, as they had *been occupied before, or subdivided them into different parts or portions, and let them with or without the rights and easements which had been before enjoyed by the several lessees of the respective houses upon or in the adjoining soil.

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Such, however, in the year 1819, being the state of the interest

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and title of the plaintiff, and of Lord Viscount Hampden, in their respective properties, it appears by the special verdict, that the Earl did not wait the falling in of the original lease at Lady Day, 1824, when he would have been entitled to the actual possession of all the premises included therein; but that, on the contrary, on the 20th July, 1819, he granted to the plaintiff and his late mother, the reversionary lease of the messuage now belonging to the plaintiff, which has been before adverted to; and subsequently thereto, namely, on the 24th September, 1822, he granted to Lord Viscount Hampden a reversionary lease of the soil of the said passage next adjoining the plaintiff's messuage, (amongst other premises,) to commence at Lady Day, 1824, and to continue for sixty-one years thence next ensuing, under which lease the present defendant, the Earl of Kinnoul, now holds by assignment.

As to the first point, therefore, which has been raised on the argument of this case, we think it clear, upon the facts stated in this special verdict, that there was no unity of possession in the Earl, both of the messuage and of the soil of the adjoining passage, at the time of the expiration of the original ground lease. For that lease having been made to the original lessees, to hold, from Lady Day, 1727, for the full term of ninety-seven years thence next ensuing, it must have expired at twelve o'clock of the night of Lady Day, 1824. But the lease of 1819 demises to the plaintiff and his mother, to hold, from Lady Day, 1824, for fifty-seven years and a half thence next ensuing. The latter was, therefore, *strictly and properly a reversionary lease commencing at the precise moment when the original lease terminated, and leaving no interval whatever between: and, indeed, as if to prevent the possibility of such a construction, the commencement of the lease is expressly stated to be "from Lady Day, 1824, when the indenture of 2nd October, 1728, would end and determine." And so again, with respect to the lease to Lord Hampden of the 24th of September, 1822, the term thereby granted, although made to commence from the 5th day of April, 1824, (the day before old Lady Day,) yet by the addition of the words, "at which time the said indenture of lease of the 2nd October, 1728, would determine," must be held to be strictly and properly a reversionary lease. When, therefore, the original lease expired, there could be no unity of possession in Lord Grosvenor, for there was no right to the possession at all: but the several and distinct possession of the messuage, in the state in which it had been before held, was continued in the lessees

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named in the lease of 1819 ; and the several and distinct possession of the passage, as it had been before held by Lord Hampden, was continued in him under the lease of 1822. Not that it is absolutely necessary for the purpose of avoiding the legal consequences of unity of possession, that both the leases should be reversionary, it is sufficient if there is a reversionary lease of the messuage alone. Even, therefore, if it could be contended as to the lease of 1822, that there existed an interval between the expiration of the original lease, and the commencement of the term granted by that lease to Lord Hampden, upon the ground, that the original lease, by the alteration of the style, expired on the 25th March, 1824, and the term newly granted was not to commence until the 5th April following ; yet, in consequence of Earl Grosvenor's reversionary lease of the messuage in 1819, the right to the possession of *both properties was severed, and there could be no unity of possession of both the messuage and the passage in him ; and if so, it is obvious that he could not, by his subsequent grant, derogate from a former valid grant which he had already made.

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We think, therefore, there is no ground for the objection, that the right in dispute was extinguished by unity of possession : but that the real question between these parties turns upon the proper construction to be put upon the lease made by the Earl of Grosvenor in 1819, for whatever effect that lease would have against the Earl, the same effect must be given to it against the present defendant, who claims only under the subsequent lease of 1822.

Now, at the time of the execution of the lease of 1819, it is found by the verdict that the plaintiff and his mother were in possession and occupation of the messuage in question, having a coal shoot or coal hole, of which the opening was in the passage, near to the house, and which ran in an oblique direction into the coal cellar of the house ; having also a water pipe under the passage, which was the sole pipe for supplying water to the house ; and two other pipes, one to supply water to a closet, and the other a pipe to carry soil therefrom ; of which the first entirely, and the other in part, passed from the interior of the house, outside the eastern wall thereof : "all which," according to the finding of the jury, "were necessary for the convenient and beneficial use and occupation of the said messuage." It is further found that the occupiers of the said messuage exercised the right of passing and repassing over the said passage, for the purpose of using their coal shoot and filling their coal cellar, and of repairing the pipes and the side and wall

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of their messuage when necessary, for a long time, that is, from as early a period as the year 1788, downwards; and *further, it is expressly stated by the jury, "that the coal shoot could not, during all the time aforesaid, and cannot be used; and that the needful and necessary repairs of the said pipes and side or wall of the said messuage, could not and cannot be done, without passing and repassing upon, through, and along the said passage." Such then, being the description of the messuage itself, and of the right actually exercised and enjoyed in and upon the soil of the passage at and before the time of granting the reversionary lease, the Earl of Grosvenor, on the 20th July, 1819, in consideration of a fine paid down, demises to the plaintiff and his mother the messuage or dwelling-house in which they had been residing for many years past, by the description of "all that piece or parcel of ground, and the messuage or tenement, erections and buildings thereupon, or on some part thereof erected and built, situate, &c., and abutting and adjoining towards the east on the said way or passage;" the lease then goes on to describe the other abutments, the exact measurement of the land, and to refer to a plan or ground plot drawn on the margin of the indenture, "together with all and singular the appurtenances unto the said piece or parcel of ground, messuage or tenement, erections, buildings, and premises, belonging or in any-wise appertaining." And the first question arising upon this lease, granted under the circumstances above stated, is, whether the use of the coal shoot, the water pipe and other pipes, passes thereby to the lessee? And we feel no doubt upon this state of facts, that the coal shoot, and the water pipe and other pipes, did pass to the lessee as integral parts of the messuage or dwelling-house itself. They are stated in the special verdict to be let into and through the walls of the dwelling-house, so that, if they were stopped or cut off, the messuage or dwelling-house must be damaged and dismembered, and would no longer *be the same as that which the plaintiff and his mother had before enjoyed, and which is described in the new lease. And it must be remembered that, at the time the Earl grants the new lease, he must be taken to know the actual state and condition of the premises which form the subject-matter of the demise. For although when his ancestor granted the original ground lease in 1728, he demised a large vacant piece of ground; in 1819 the Earl demised a messuage or dwelling-house of a certain definite and known shape, size, and character, consisting of certain parts and additions, as it then actually stood. We cannot therefore

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feel any doubt, but that under the description contained in the lease, the coal shoot and the several pipes passed to the lessee as a constituent part of the messuage or dwelling-house itself.

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The next question which then arises, and that upon which the determination of the present case rests, is, whether the right of passing and repassing over the soil of the passage, and using it for the purposes above mentioned, did also pass to the lessees under this lease. And we are of opinion that, upon the facts found in this special verdict, such right did pass as a necessary incident to the subject-matter actually demised, although not specially named in the lease. The rule laid down in Plowden's Comm., 16 a, is, "that by the grant of any thing, *conceditur et id, sine quâ res ipsa haberi non potest*; as if one grants his trees, the grantee may enter upon his land for the cutting down and carrying them away," for which the authority of the Year Book, 2 Ric. II., is cited. And again, TWISDEN, J. in *Pomfret v. Ricraft* (1), lays down the rule of law to be, "when the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such use. As if *a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me." Now, in the present case, the jury have found expressly in their verdict, that the passing and repassing over the way or passage is not merely convenient, but necessary "for the use of the coal shoot, and of the pipes, and of the repairing and amending the same, and the side or wall of the house;" to the performance of which, it is also to be observed, the lessees are expressly bound by the covenant entered into by them with the lessor by the same lease.

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Since, therefore, as it appears to us, the right in question passed to the lessees under the reversionary lease of 1819, as incidental to the enjoyment of that which was the clear and manifest subject-matter of demise, it becomes unnecessary to consider the question argued at the Bar before us, how far the same right might or not pass to the lessees under the express words used in the lease itself, as "an appurtenant unto the said piece or parcel of ground, messuage or tenement, erections, buildings, and premises, belonging or appertaining." There are strong authorities in the law books to show these words capable of a wider interpretation, and of carrying more than is an appurtenant in the strictly legal sense of that word,

(1) 1 Saund. 322.

HINCHLIFFE where such interpretation is necessary in order to give that word some operation. Such are the cases in Moor's Rep. 682, *Archer v. THE EARL OF KINNOUL, Bennett* (1), *Hill v. Grainge* (2), and others. But we think it at once sufficient, and at the same time safer, to rely upon the ground on which we have already held that the right claimed by the plaintiff may be supported, and to give no opinion upon this second point.

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Upon the whole, it appears upon the facts stated in this special verdict, that the ground upon which the defendant has principally relied for the extinguishment of the right set up by the plaintiff, viz., the unity of possession of the messuage and of the soil of the passage over which such right is claimed, does not exist: that the way in question was in fact enjoyed in *alieno solo* at the date of the lease, and that the same was necessary for the use and repair of the coal shoot, pipes, and side and wall of the house: that the lease was made by the person entitled to the reversion both of the messuage and the soil of the passage, that is, by a person who had the power to grant, or to continue the existence of, such right, at the time the lease was to come into operation and effect: and that if the words of the lease will admit of such construction, it was the apparent intention of the parties to that instrument, arising from the state and circumstances of the property, and the language of the instrument itself, that they should be so construed: more especially when it is observed, that the lessor at the time he is making a reversionary demise of the messuage, which has been built upon his land during the existence of the original lease, requires from the lessee a covenant to repair and keep in repair the said messuage, and all other erections that should be built, and to purge, scour, and cleanse all pipes, &c. made, or to be made; words which are peculiarly applicable to the existing state of the premises.

Under these circumstances, we think, in supporting the right claimed, upon the legal principle on which we have placed it, without laying down that the easement or right is included in the express words of the lease, we do no more than carry into effect the intention of the parties themselves. We therefore give

Judgment for the plaintiff.

(1) 1 Lev. 131; Sid. 211.

(2) Plowd. Comm. 170.

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BIRMINGHAM RAILWAY COMPANY.

(5 Bing. N. C. 27—37; S. C. 6 Scott, 719; 1 Arn. 363; 8 L. J. (N. S.)
C. P. 47.)

1838.
June 8.

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An estate tail granted by King Charles II. to one of his illegitimate children for love and affection, may be well barred by a disentailing deed under the Fines and Recoveries Act, notwithstanding the statute 34 & 35 Hen. VIII. c. 20.

By order of the MASTER OF THE ROLLS, the following case was submitted for the opinion of this Court.

By letters patent, bearing date the twenty-fifth year of the reign of Charles II., his Majesty, for and in consideration of the true and acceptable service very frequently performed by his well-beloved and right trusty cousin and counsellor, Henry, Earl of Arlington, his principal secretary, and for divers other good causes and considerations him thereto especially moving, of his especial grace, and of his certain knowledge and mere motion, did give and grant unto the aforesaid Earl of Arlington, amongst other hereditaments, all that the honour of Grafton in the county of Northampton; and all that the lordship and manor of Grafton, and the manor of Hartwell, in the said county of Northampton, parcel of the honour of Grafton, with all and singular their rights, members, and appurtenances whatsoever; and also divers lands, tenements, and hereditaments therein particularly described, situate, lying, and being in the parishes of Blisworth, Ashton, and Hartwell, in the county of Northampton, and elsewhere in the said county; all which property was described as having been theretofore granted to trustees for ninety-nine years, in trust for Queen Katharine if she should so long live; to hold to the said Earl Arlington, from and immediately after the determination of the estate of the trustees, for and during the term of the life of him, Lord Arlington, paying a yearly rent of 20*s.* And further, the said King, in consideration of the natural love and *affection which he had and bore towards his most dear natural son Henry Fitzroy, Earl of Euston, and for divers other good causes and considerations him thereunto especially moving, of his especial grace, certain knowledge, and mere motion, for himself, his heirs, and successors, did give and grant the aforesaid honour, lordship, and manor of Grafton aforesaid, and all and singular other the manors, lands, tenements, hereditaments, rents, farms, office of feodary, coppices, woods and underwoods, reversions, remainders, and other the premises aforesaid, and every part and

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parcel thereof, to have, hold, and enjoy the same, with all their and every of their rights, members, and appurtenances, to the aforesaid Henry Fitzroy, Earl of Euston, and the heirs male of his body lawfully begotten and to be begotten, immediately from and after the determination of the estate and interest of the aforesaid trustees, of and in the said premises, and from and after the death of the aforesaid Henry Earl of Arlington, to the only proper use and behoof of the aforesaid Henry Fitzroy, Earl of Euston, and his heirs male, for ever; rendering and paying therefore yearly to the said King, his heirs and successors, the yearly rent of 20s.; and for default of such issue of the Earl of Euston, on the like considerations and the like rent, to the King's second natural son, Charles, Earl of Southampton, and the heirs male of his body issuing; and for default of such issue, on the like considerations and the like rent, to the King's third natural son, Lord George Fitzroy, otherwise Palmer: And the said King, of his more abundant special grace, and of his certain knowledge and mere motion, did for himself, his heirs and successors, declare and grant that the said letters patent, or the enrolment thereof, and all and every the gifts and grants in the same contained or specified, might and should be, to the said Henry, Earl of Arlington, and after his decease, to the said Henry, *Earl of Euston, and the heirs male of his body lawfully begotten and to be begotten, and for default of such issue, to the said Charles, Earl of Southampton, and the heirs male of his body lawfully begotten and to be begotten, and for default of such issue, to Lord George Fitzroy, otherwise Palmer, and the heirs male of his body lawfully begotten or to be begotten, in and by all things good, valid, and effectual in law, towards and against the said King, his heirs and successors, according to the true intent thereof; and should be accepted, construed, and interpreted in all his Courts and elsewhere, in the most beneficial, liberal, and favourable sense, for the benefit and advantage of the said Henry, Earl of Arlington, during his natural life, and after his decease, for the benefit and advantage of the said Henry, Earl of Euston, and the heirs male of his body lawfully begotten and to be begotten, and for default of such issue, for the benefit and advantage of Charles, Earl of Southampton, and the heirs male of his body lawfully begotten and to be begotten, and for default of such issue, for the benefit and advantage of the said Lord George Fitzroy, otherwise Palmer, and the heirs male of his body lawfully begotten and to be begotten; and that, without any confirmation, licence, or toleration, to be

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from the said King, his heirs or successors, in that behalf procured or obtained, notwithstanding the misnaming or not naming, misreciting or not reciting, the aforesaid honour, lordship, manors, and other the premises, by the now stating letters patent granted, or mentioned to be granted, or any part or parcel thereof, &c.; and notwithstanding any other defects in not naming or mentioning, or not rightly naming or mentioning the natures, kinds, sorts, quantities, or qualities, metes, or bounds of the premises, or of any parcel thereof, or any person or persons who then were or theretofore had been seized of the premises, or of any *parcel thereof; any statute, Act, ordinance, proviso, thing, or matter whatsoever to the contrary thereof in anywise notwithstanding.

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The said Katharine, the wife of his said Majesty King Charles II., died in the lifetime of Henry, Earl of Arlington.

Henry Fitzroy, Earl of Euston, was born in the year 1663, and consequently was at the time of the making of the letters patent, of the age of nine years.

In the year 1675, the said Henry Fitzroy, Earl of Euston, was created Duke of Grafton.

Henry, Earl of Arlington, died in the year 1683.

Upon the death of Henry, Earl of Arlington, Henry Fitzroy, Duke of Grafton, formerly Henry Fitzroy, Earl of Euston, under and by virtue of the before mentioned grant, entered into the possession or into the receipt of the rents and profits of the said honour, lordship, and manor of Grafton, and the several other lands, tenements, hereditaments, and premises comprised in the grant, and thereby granted to him by the description of Henry Fitzroy, Earl of Euston, and his heirs male; and he continued in such possession or receipt until the time of his death.

The said Henry Fitzroy, Duke of Grafton, died in the month of October, 1690, leaving Charles, Duke of Grafton, his eldest son and heir in tail male.

Upon the death of Henry Fitzroy, Duke of Grafton, Charles, Duke of Grafton, became entitled as tenant in tail male under the before mentioned grant, to the honour, lordship, and manor of Grafton, and the several other lands, tenements, hereditaments, and premises comprised in the grant, and entered into the possession, or into the receipt of the rents and profits of the same, and continued in such possession or receipt until the time of his death.

The said Charles, Duke of Grafton, died on the 6th of May, 1757,

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leaving Augustus Henry, Duke of Grafton, his grandson and heir in tail male.

Upon the death of Charles, Duke of Grafton, the said Augustus Henry, Duke of Grafton, became entitled as tenant in tail male, under the said grant to the honour, lordship, and manor of Grafton ; and the several other lands, tenements, hereditaments, and premises comprised in the grant ; and he accordingly, upon the death of Charles, Duke of Grafton, entered into the possession or into the receipt of the rents and profits of the same, and continued in such possession or receipt until the time of his death.

The said Augustus Henry, Duke of Grafton, died on the 14th of March, 1811, leaving the plaintiff, George Henry, Duke of Grafton, his eldest son and heir in tail male.

Upon the death of Augustus Henry, Duke of Grafton, the plaintiff became entitled as tenant in tail male under the said grant to the honour, lordship, and manor of Grafton, and the several other lands, tenements, hereditaments, and premises comprised in the grant ; and entered into the possession or the receipt of the rents and profits of the same, and has ever since been in such possession or receipt.

By an indenture of bargain and sale, bearing date the 6th of February, 1835, which was duly made and executed by and between the plaintiff George Henry, Duke of Grafton, of the one part, and John Parkinson, Esq. therein described of the other part, and was duly enrolled in the Court of Chancery on the 14th of the same month of February, 1835,—after reciting, as the fact was, that the plaintiff George Henry, Duke of Grafton, was desirous of docking, barring, and extinguishing all estates tail then vested in him, and all remainders and reversions and other estates whatsoever expectant thereupon, whether vested in or belonging to *the King's most excellent Majesty, or any other person and persons, of and in the lands and hereditaments thereafter described or referred to, and of limiting the same and the inheritance thereof in fee simple to the use of the said J. Parkinson, his heirs and assigns, it was witnessed, for the intent and purpose of docking, barring, and extinguishing all estates tail of the plaintiff George Henry, Duke of Grafton, and all other estates tail and remainders and reversions thereupon expectant or depending, whether vested in or belonging to the King's most excellent Majesty, or to any other person or persons, of and in the lands and other hereditaments therein mentioned and intended to be thereby bargained and sold, and in

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consideration of the sum of 10s. by J. Parkinson to the plaintiff George Henry, Duke of Grafton, paid, the plaintiff George Henry, Duke of Grafton, under and by virtue and in pursuance of the powers and provisions given by and contained in an Act of Parliament passed in the 3rd and 4th years of the reign of Will. IV., intituled "An Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," granted, bargained, and sold unto the said J. Parkinson, his heirs and assigns, all those plots, pieces or parcels of land, tenements and hereditaments situate, lying, and being in the parishes of Blisworth, Ashton, and Hartwell, some or one of them, or elsewhere in the county of Northampton, therein particularly described, the said hereditaments and premises being part and parcel of the honour, manor, and lordship of Grafton, and other hereditaments in the county of Northampton, which by the hereinbefore stated letters patent were granted in remainder or reversion to Henry Fitzroy, then Earl of Euston, (the lineal ancestor of the plaintiff George Henry, Duke of Grafton,) and the heirs male of his body, with remainders over to other persons, and the *heirs male of their respective bodies, as therein mentioned, together with the appurtenances to the said premises belonging; to hold the said lands and all and singular other the hereditaments and premises thereinbefore bargained and sold, or otherwise assured, or expressed or intended so to be, with the appurtenances unto the said John Parkinson, his heirs and assigns, to the use of the said J. Parkinson, his heirs and assigns for ever.

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The question for the opinion of the Court was, whether the estate tail of the plaintiff George Henry, Duke of Grafton, and all other estates tail and remainders and reversions, thereupon expectant, or depending, whether vested in or belonging to the King, or to any other person or persons of and in the lands and hereditaments comprised in the before mentioned indenture of bargain and sale of the 6th of February, 1835, which were created or reserved by the before mentioned letters patent of the twenty-fifth year of the reign of his late Majesty King Charles the Second, were effectually barred and extinguished by the said indenture of bargain and sale.

Wilde, Serjt. for the plaintiff:

The estate tail vested in the plaintiff, and all other estates expectant on it, were barred by the bargain and sale of 1835.

The statute 3 & 4 Will. IV. c. 74, s. 15, enables every actual

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tenant in tail to dispose of for an estate in fee simple absolute, or any less estate, the lands entailed. Sect. 17, indeed, provides that this power of disposition shall not extend to tenants of estates tail who are restrained from barring their estates tail by 34 & 35 Hen. VIII. c. 20. But that Act applies only, as appears by the preamble, to estates tail granted by the Crown as a recompense for the service of the donees; and the plaintiff's estate was granted to his ancestor, the Earl of Euston, *by Charles II., in consideration of the love and affection the King entertained towards him as his natural son. At the time of the grant he was only nine years of age, and could not, therefore, have rendered any service to the Crown. That such is the construction which has been put on 34 & 35 Hen. VIII. c. 20, appears from the cases of *Lord Nottingham v. Lord Munson* (1), *Perkins v. Lovell* (2), and Co. Litt. 372 b, 6th rule.

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And though, where the offspring is illegitimate, the Courts do not recognise the relation between father and child, yet where any relationship has been expressed in a deed as the consideration for a grant, it has been held sufficient, without investigating whether or not there has been a pecuniary consideration also; as in the case of uncle and nephew: *Filmer v. Gott* (3), *Warry v. Warry* (4). The Court will not imply that services have been rendered from the general words "divers other good causes and considerations:" they have no effect; have never been held to import a consideration: *Wiseman's case* (5), *Mildmay's case* (6); and are not sufficient to raise a use: Vin. Abr. Consideration, B. It has always been the practice to state the services when they have formed the consideration of the grant; and if, in the absence of such statement, the Court could in any instance presume them, at all events such presumption cannot be made in the case of an infant.

Channell for the defendants:

No case has expressly decided that a gift in tail, in order to fall within the restriction of 34 & 35 Hen. VIII. c. 20, must have been a recompense for the service of the donee, or that such service should expressly appear on the grant to have been the consideration. In *Perkins v. Lovell*, the *Court only decided that the grant in question before them, was neither a gift nor a reward, but an act of justice. And the first part of the preamble of 34 & 35 Hen. VIII. c. 20,

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(1) Dyer, 32 a.

(2) 4 Burr. 2223.

(3) 4 Br. P. C. 270.

(4) 3 Bligh, 1.

(5) 2 Co. Rep. 15.

(6) 1 Co. Rep. 173 b.

applies generally to all gifts by the Crown: "where divers of the King's most noble progenitors, and especially the King, our sovereign lord, most liberally above all other, hath given and granted, or otherwise provided to his and their loving and good servants and subjects, as well nobles as others, manors, meases, lands, tenements, rents, services and hereditaments, to them and to their heirs males of their bodies, or to the heirs of their bodies lawfully begotten, meaning at the time of such gifts not only to prefer and advance presently the donees, but also their heirs in blood of their bodies according to the limitations of the said gifts," &c.: It is only by the use of the word "such," in the following passage, "to the intent recompense for the service of such donees should not only be a benefit for their own persons but for their heir," that it can be contended the statute is confined to gifts for services. But the Court will intend that the consideration has been a service rendered, rather than hold the grant to be void for want of consideration: and though it be not probable, it is by no means impossible that an infant might render a service to a person of full age. Here, without presuming such service, the grant would be without consideration; for an illegitimate child is a stranger to the putative father, and when an estate is granted for divers good causes and considerations to one not of the grantor's kindred, no use arises: *Shep. Touchst.* 510, 11. But those words are sufficient to raise a presumption of service; as in the case of a bargain and sale they would let in proof of a pecuniary payment: *Fisher v. Smith* (1). And the Court will the *more readily make such a presumption, as it is contrary to public policy that grants should be made of the property of the Crown or from the public money, except for services rendered to the public. By the statute 4 Hen. IV. c. 4, the Crown was bound to make no grants upon other considerations, and persons who solicited without merit, were liable to punishment. "Item come devaunt ses heures plusours douns et grantes aiente este faitz as diverses persones sibien des revenues du droit de la corone d'Engleterre come des gardes mariages terres et tenementz et autres diverses commoditees sanz bone deliberation ent eue sicome les ditz communes ont monstrez a nostre dit seigneur le roy en parlement mesme nostre seigneur le roy eut veullant purvoir de remede ad declarrez qe son entent est de soy abstenir de faire aucuns tielz douns ou grantes sinon a ceux persones qe le deservont et come meultz y semblera a roy et son conseil. Et depuis qil est le desire

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(1) *Moore*, 509.

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de toutz les estats du roialme qe riens soit ensy demande de mesme nostre seignur le roy il voet qe toux ceux qi facent aucuns tielz demandes de luy a contraire de cest estatut soient puniz par advis de luy et de son conseil et qe celuy qensi face tiele demande jammais nait la chose ensi demandee."

Wilde :

That statute applies only to King Henry IV. The statute 3 & 4 Will. IV. c. 74, is remedial, and ought to be construed liberally. The Court, therefore, will not presume that a grant has been made for services where the deed is silent on the subject. And love and affection for an illegitimate child, when expressed and acted on, as here, is a sufficient consideration for a grant, and has never been held otherwise.

The following Certificate was afterwards sent :

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"We are of opinion that the estate tail of the plaintiff George Henry, Duke of Grafton, and all other estates *tail and remainders, and reversions thereupon expectant or depending, whether vested in or belonging to the King's most excellent Majesty, or to any other person or persons of and in the lands and hereditaments comprised in the indenture of bargain and sale of the 6th day of February, 1835, which were created or reserved by the letters patent of the 25th year of his late Majesty King Charles II., were effectually barred and extinguished by the indenture of bargain and sale above referred.

"N. C. TINDAL.

"J. A. PARK.

"J. VAUGHAN.

"T. COLTMAN."

1888.
Nov. 12.

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CALLANDER v. OELRICHS AND ANOTHER.

(5 Bing. N. C. 58—66 S. C. 6 Scott, 761 ; 8 L. J. (N. S.) C. P. 25.)

Upon an undertaking to effect an insurance according to special instructions, a part of the duty implied is the giving notice to the employer in case of failure ; and an actual promise to that effect, though averred in the declaration, need not be proved.

THE declaration stated, that before the time of the making the promise of the defendants hereinafter mentioned, the plaintiff had shipped a certain large quantity, to wit, 800 quarters of wheat, of great value, to wit, of the value of 1,760*l.*, in and on board a certain ship called the *Johanna*, then lying in the port of London,

which said ship or vessel, with the said wheat on board thereof, was about to proceed on a certain voyage from London to Baltimore in America: and thereupon on the 22nd of April, 1835, in consideration that the plaintiff, at the request of the defendants, had then retained and employed the defendants as his agents, for certain commission and reward to them in that behalf, to sell and dispose of the said wheat on its arrival at Baltimore, and to make and effect a certain insurance thereon upon certain terms and conditions, that is to say, to effect an insurance upon the said wheat, whereby the same should be insured against the perils of the sea, for and during the said intended voyage from London to Baltimore, to the amount of the value thereof, to wit, the sum of 1,760*l.*; and that upon the making and effecting of such insurance, the defendants should stipulate and agree with the assurers thereof in and by any policy or policies of assurance whereby the same should be insured, that the said wheat should be declared subject to particular average above 10*l.* per cent., the defendants undertook and faithfully promised the plaintiff to use due and reasonable diligence in the premises, and faithfully to discharge and execute their duty as such agents; and in the event of any difficulty *arising in effecting such insurance, or in case they should be prevented effecting such insurance on the terms aforesaid, to give notice thereof to the plaintiff within a reasonable time: that the plaintiff, confiding in the said promise of the defendants, afterwards, to wit, on, &c., indorsed and delivered the bill of lading of the said wheat to the defendants, and that the defendants then took possession thereof upon the terms and for the purpose aforesaid: and thereupon it became and was the duty of the defendants, as such agents, to cause the said wheat to be insured on the terms and conditions pointed out in that behalf, pursuant to the orders and directions of the plaintiff in the premises; or, if they did not cause the same to be so insured, then to give notice to the plaintiff within a reasonable time then next following that they had not done so: that the defendants, disregarding their duty as such agents and their said promise, did not nor would obey and fulfil the directions of the plaintiff in that behalf, but on the contrary thereof, wrongfully and improperly disobeyed the same, by effecting an insurance upon the said wheat, free from average, unless general, or the ship should be stranded; and further disregarding their duty as such agents, and their said promise, wholly omitted to give the plaintiff such notice as aforesaid, although a reasonable time in that behalf

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afterwards, and after the defendants had effected such last-mentioned insurance, and before the loss hereinafter mentioned, had elapsed: that after the said ship, with the said wheat on board, had set sail from London, and before her arrival at Baltimore, by the violence of the winds and the waves and other perils of the seas, the said wheat was greatly wasted and spoiled, whereby the plaintiff sustained an average damage or loss upon the said wheat, to a larger amount than 10l. per cent., to wit, the amount of ninety pounds by the hundred for *each and every one hundred pounds of the value of the said wheat so insured by the said policy: that by means of the premises he was wholly prevented from effecting an insurance upon the wheat upon the terms and conditions he had requested and directed the defendants to effect it, and as he might and otherwise would have effected it, if the defendants had given such notice as aforesaid; and had not only lost all the gains and profits which might and otherwise would have arisen to him from the produce of the sale of the wheat at Baltimore, but had been totally deprived of all the means of recovering the said amount of average loss so by him sustained.

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The defendants pleaded 1, *non assumpsit*; 2, that the defendants did give notice of difficulties in effecting the insurance; 3, that the wheat was not damaged.

It appeared at the trial, that the defendants, who were not insurance-brokers, but agents for the shipping of the plaintiff's corn, undertook to use, and did use, unsuccessfully, their endeavours to effect an insurance according to the instructions set forth in the declaration: they never apprised the plaintiff of their want of success: but it was not proved that they had made any express promise to give notice in case they failed in their endeavours.

COLTMAN, J. left it to the jury to say whether that promise was not implied in the undertaking to effect an insurance; and

The jury, after finding for the plaintiff on all the issues, found also that the defendants undertook to give notice in case they failed to effect the insurance,

A rule *nisi* having been obtained for a new trial, on the ground that there was no evidence of any such undertaking,

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Sir F. Pollock and *R. V. Richards*, who showed cause, contended, that upon an undertaking to effect an insurance according to special instructions, a part of the duty to be implied was the giving notice to the employer in case of failure: the jury, therefore,

were warranted in inferring from evidence that the defendants undertook to insure, an undertaking to give notice in case of failure: and there was no variance from the declaration; for though when the consideration is entire the whole of it must be proved as laid, yet it is sufficient to prove as a breach the omission to perform any part of an undertaking.

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Ogle, in support of the rule :

As the defendants were not insurance-brokers, they had sufficiently discharged their duty by using their best endeavours to effect an insurance. They were not bound to give the plaintiff notice of their want of success: that was a distinct undertaking, and having been alleged in the declaration, ought to have been proved. If there was gross negligence, the plaintiff ought to have sued in an action on the case, and then the defendants would have been allowed to stand in the situation of the underwriter: *Delaney v. Stoddart* (1), *Webster v. De Tastet* (2), *Harding v. Carter* (3). For aught that appeared to the contrary, it might have been impossible for the defendants to have furnished the plaintiff with the notice in question; he might have been out of the way. But the liability to give the notice could only arise by special agreement; it was something beyond the common law duty; as in *Corbett v. Pakenham* (4), where, in a declaration on the case, one count stated that the plaintiff, at the request of the defendant, had caused to be delivered to him certain boars, pigs, &c., to be taken care of by the defendant for the plaintiff for reward to the defendant, and in consideration thereof, the defendant undertook, and then and there agreed with the plaintiff, to take care of the boars, &c., and to re-deliver the same on request, it was held on motion in arrest of judgment, that that was a count in assumpsit, and could not be joined in with counts in case: and in answer to the objection, that as the party had merely agreed to do that which was a common law duty, it was unnecessary to resort to the promise, and therefore it might be rejected, and the count still be considered as in tort, BAYLEY, J. said, "The common law duty of the defendant was to take care of the pigs delivered to him, in order that the plaintiff might come and take them away; but the count alleges, that the defendant, in consideration of the reward to be paid, undertook and agreed to take care of the pigs, and to re-deliver them to the

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(1) 1 R. R. 139 (1 T. R. 22).
(2) 4 R. R. 402 (7 T. R. 157).

(3) 1 Park, Ins. 4.
(4) 6 B. & C. 268.

CALLANDER plaintiff, and the breach is that he did not re-deliver them. That
 v. requires something to be done by the defendant beyond the common
 OELRICHS. law duty. The obligation to re-deliver arose out of the agreement
 alone." So here, if the obligation to give notice arose only out of
 the promise, the promise ought to have been proved.

TINDAL, Ch. J. :

I am of opinion that this rule must be discharged.

The question arises on a declaration, in which the duty of an agent is stated to be, to cause certain wheat to be insured upon certain terms pointed out to him by the plaintiff, and in case he failed to effect the insurance on those terms, to give notice of his failure within a reasonable time.

[*63] Upon a motion for a new trial after a verdict for *the plaintiff, the objection is, that no evidence was offered at the trial to prove that the defendant promised to give notice in case he should fail to effect the policy : and the question is, whether this part of the defendant's promise is not inferrible by law as arising out of the office the defendant undertook. It is well established as the course of pleading, that a plaintiff may either state generally, that the defendant undertook to discharge a certain duty,—as in *Powley v. Walker* (1), where the declaration stated that the defendant had become tenant to the plaintiff, and, in consideration thereof, undertook to cultivate the farm in a husband-like manner, and not to carry away manure or compost ; and in answer to an objection in arrest of judgment, that there was no consideration for the promises, the Court said, that the bare relation of landlord and tenant was a sufficient consideration,—or he may specify points which do not arise out of the bare relation between the parties, taking care, however, not to lay the promise too large ; as in *Brown v. Crump* (2), where a declaration, that in consideration that the defendant had become tenant to the plaintiff of a farm, the defendant undertook to leave a certain quantity of fallow, and to spend 60*l.* worth of manure every year thereon, and to keep the buildings in repair, was held bad on general demurrer ; those obligations not arising out of the bare relation of landlord and tenant.

This brings the case, therefore, simply to the question, whether the words " And in the event of any difficulty arising in effecting such insurance, to give notice to the plaintiff within a reasonable time," added to the words, " undertook to use reasonable diligence

(1) 2 R. R. 619 (5 T. R. 373).

(2) 6 Taunt. 300 ; 1 Marsh. 567.

and faithfully to discharge their duty as agents," express any thing more than a duty inferrible from the nature of the defendants' *undertaking. I think they do not: for the defendants' engagement with the plaintiff would not be well discharged, unless the plaintiff were informed of the defendants' failure to accomplish the end in view: had he received such information, it is by no means certain he might not himself have effected the insurance by application at other offices, or an offer of other terms. I think, therefore, that the case falls within the decision of the Court, in *Smith v. Lascelles* (1), where it was held, that if a merchant here has been accustomed to procure insurances for his correspondent abroad, in the usual course of trade, the latter has a right to expect an insurance at the hands of the former, unless some previous notice be given to the contrary; and ASHHURST, J. said, "It is true, indeed, that one person cannot compel another to make an insurance for him against his consent; but if the directions to insure be given to him, to whom the application would naturally be made in the usual course of trade, and he do not give notice of his dissent, he must be answerable for his neglect, because he deprives the other of any opportunity of applying elsewhere to procure the insurance."

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In the same manner, if in an action by landlord against tenant, the landlord had said in the declaration, that the defendant undertook to cultivate the land in a husband-like manner, and not to pull down the hedges, it would have been unnecessary to prove an actual promise to that effect.

VAUGHAN, J. :

I think, also, that this rule must be discharged. The jury have expressed their opinion as to what the defendants ought to have done under the circumstances in which they were placed: it is objected, that there was no express stipulation for the defendants *to give notice in case they failed to effect the insurance: but it is a necessary inference, from the nature of the business in which they had engaged, that it was their duty to give that information. The case cited, about the bailment of pigs, has no analogy to the present: the bailor might have been at a distance, where it would be difficult to communicate with him; and a promise to re-deliver the pigs could not be inferred from the bare delivery: but no obstacle to the notice is suggested on the part of these defendants.

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CALLANDER BOSANQUET, J. :

OELEBRICH.

I am of the same opinion. The jury were warranted in concluding, that if the defendants were to effect an insurance upon the terms in question, they undertook to give notice in case of failure: that undertaking arises out of the nature of the case, and the relation in which the parties stood to each other: and according to the principle laid down in *Smith v. Lascelles* if a merchant is led, from previous transactions, to expect that his correspondent will effect an insurance, he has a right to rely on his discharging that duty, unless he receives a letter to the contrary. Whether that expectation arises from previous dealings, or from an undertaking to insure in the particular instance, can make no difference; and BULLER, J. says, "Where the merchant abroad has no effects in the hands of his correspondent, yet, if the course of dealing between them be such, that the one has been used to send orders for insurance, and the other to comply with them, the former has a right to expect that his orders for insurance will be obeyed, unless the latter give him notice to discontinue that course of dealing."

COLTMAN, J. :

[*66] I thought at the trial, and am still of the same opinion, that it was cast on the defendants to *give notice of their failure to effect the insurance, in order that the plaintiff might take further steps if he thought fit.

If that was a duty cast on them by the nature of the transaction, the pleader was right in treating it as a promise implied by the dealing between the parties. The verdict therefore is right, and this rule must be

Discharged.

1838.
Nov. 15.

JACKSON AND ANOTHER v. GALLOWAY.

(5 Bing. N. C. 71—76; S. C. 6 Scott, 786; 8 L. J. (N. S.) C. P. 29.)

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Under a charter-party to load coals and iron at Cardiff, and proceed with them to Alexandria, the running days to commence on the 16th of December, 1834, plaintiff having, with defendant's consent, laden the coals at Pembroke in ten days ensuing the 16th of December, and not having sailed for Cardiff till the 27th: Held, that the running days were still to be reckoned from the 16th of December, and that proof of defendant's consent satisfied an allegation in the declaration that the coals had been laden at Pembroke at his request.

THE plaintiffs declared in assumpsit on a charter-party bearing date December 2nd, 1834, under which their ship, then at

Pembroke, was to sail with all convenient speed to Cardiff, there to be loaded with a cargo of coals and iron, with which she was to proceed to Alexandria; forty running days to be allowed the merchant, if the ship were not sooner despatched, for loading the ship at Cardiff and unloading at Alexandria; to commence on the 16th of December; cease when loaded and despatched; recommence on arrival at Alexandria; and finally cease when unloaded: ten days, on demurrage over and above the laying days, at 7*l.* per day. The plaintiffs averred that after the making the charter-party, the ship, being at Pembroke, remained there by the consent of the plaintiffs, and at the request of the defendant, from the 2nd to the 17th of December, for the purpose of receiving coals on board, instead of being loaded with such coals at Cardiff; that the plaintiffs, at the request of the defendant, received on board the ship at Pembroke a cargo of coals, and that the defendant dispensed with that part of the charter-party which related to the sailing with all convenient speed from Pembroke to Cardiff; that the ship sailed from Pembroke on the 17th of December, and arrived at Cardiff on the *18th of January, 1895, where she completed her cargo, and was ready to proceed on her voyage on the 2nd of February, of which the defendant had notice; but that the defendant detained her at Cardiff twenty days over and above the lay days and ten days of demurrage in the charter-party mentioned: that, on the 19th of February the ship proceeded to Alexandria, where she arrived on the 10th of July, and was ready to unload on the 13th, of which the defendant had notice; but that the defendant detained her there thirty days over and above the lay days and the ten days of demurrage in the charter-party mentioned. Breach; refusal to pay freight and primage according to the terms of the charter-party, or the sum due for the demurrage of the ship at Cardiff.

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There were also general counts for freight and the use and hire of the ship.

The defendant, by his pleas, traversed the making the charter-party; his request and consent to load the ship at Pembroke; her detention there; his dispensing with the stipulation relating to the ship's proceeding at once from Pembroke to Cardiff; the proceeding to Cardiff with convenient speed; the readiness to load at Cardiff; and the detention at Cardiff and Alexandria.

There was also a plea that, by mutual consent the charter-party was altered in this, that the running days should commence three

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days after the arrival of the ship at Cardiff; and that she arrived there on the 9th of January.

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At the trial, before Tindal, Ch. J., it appeared that on the 16th of December the plaintiffs' ship was at Pembroke, where she took in a part of her cargo, and remained till the 26th. On the 10th of January following, having been delayed by stormy weather, she arrived at Cardiff, where she was detained forty days, till the 19th of February; she then sailed for Alexandria: *there she was further detained for ten days. The demand for freight was settled before the trial; and the point in dispute was twenty days claimed for demurrage.

The defendant attempted to show that the taking in cargo at Pembroke was at the request and for the convenience of the plaintiffs; and contended that they could not recover for the ten days occupied at that port. The jury found, as the result of a long correspondence between the parties, that the ship was loaded at Pembroke at the plaintiffs' request, but with the defendant's consent, and that there was no agreement to alter the charter-party in the manner alleged in the plea: and the ship having been detained altogether twenty days over and above the forty running days, they gave a verdict for 170*l.*, being 70*l.* for ten days' demurrage, at 7*l.* a day, as provided by the charter-party, and 100*l.* for the other ten days.

Talfourd, Serjt. obtained a rule *nisi* to reduce the damages by the amount of ten days. In allowing twenty days, the jury must have included the ten days at Pembroke, which, upon this state of the pleadings and facts, they ought not to have included.

By the charter-party the running days were to commence at Cardiff: the plaintiffs had not declared that there was any agreement to substitute Pembroke for Cardiff, but had merely alleged an excuse for not beginning to load at Cardiff; namely, that the defendant had requested them to begin loading at Pembroke instead, and had dispensed with their beginning at Cardiff: that allegation, however, they had failed to prove; for it was at the plaintiffs' request, not at the defendant's, that the loading commenced at Pembroke. The defendant only consented. The jury, therefore, ought to have been directed not to allow any lay days at Pembroke.

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Wilde, Serjt., who showed cause, contended that, after the finding of the jury, the word "Pembroke" must be considered as

inserted in the charter-party instead of Cardiff, by mutual consent; that the issue upon that head had been, in substance, established by the plaintiffs; for if the parties agreed, it was immaterial from which of them the request proceeded; and the result would be to leave the charter-party in all other respects the same as before; so that the lay days ought to be reckoned from the 16th of December, though the ship was partly loaded at Pembroke instead of Cardiff.

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Talourd and R. V. Richards, in support of the rule, argued that the loading at Pembroke having taken place at the plaintiffs' request, and, it might thence be inferred, for their convenience, the defendant's assent to that request did not amount to a new contract, or authorise the plaintiffs to reckon their lay days from Pembroke instead of Cardiff.

TINDAL, Ch. J. :

The question is, whether, upon the facts proved at the trial, the jury have done wrong in allowing 170*l.* damages. The contract was for the plaintiffs' ship to proceed to Cardiff to take in a cargo of coals and iron, and therewith to proceed to Alexandria: forty running days to be allowed the merchant for loading at Cardiff and unloading at Alexandria, to commence on the 16th of December; and ten days on demurrage over and above the laying days, at 7*l.* a day. The question is, whether, after this contract was entered into, there was any subsequent agreement to vary it in any respect, and what was the effect of such variation. It appears that, after the contract was entered into, a correspondence took place between the parties, the result of which was that, at the instance of the plaintiffs, *and with the consent of the defendant, the coals were to be taken on board at Pembroke instead of Cardiff. The defendant says that this was no alteration of the contract, but merely a request made on the part of the plaintiffs for their own convenience, and acquiesced in by the defendant. I am not subtle enough to distinguish that from an alteration of the contract. Every contract consists of a request on one side, and an assent on the other.

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I think, therefore, that there was an agreement to vary the contract to a certain extent, that is, to take in the coals at Pembroke instead of Cardiff; and then comes the question, whether the ship-owner is entitled to reckon lay days while the ship was lying at

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Pembroke. The defendant contends that the agreement to substitute Pembroke for Cardiff did not convey any right to charge for lay days at Pembroke, and that I ought so have directed the jury. But it seemed to me that the mere substitution of Pembroke for Cardiff left the rest of the charter-party as it stood before; and, according to the charter-party, the lay days were to be reckoned from the 16th of December, wherever the ship might be stationed. Suppose the case of an agreement with a builder: an alteration as to any details in the structure would not discharge the builder from being called on to carry into effect the rest of the contract according to the original agreement. When, therefore, these parties came to an agreement to load the coals at Pembroke instead of Cardiff, the lay days must be reckoned from the 16th of December, at Pembroke, as if the vessel had been at Cardiff. If it had been shown that there had been any delay on the part of the captain, the decision might have been different; but no suggestion of that sort was made on the part of the defendant: this rule, therefore, must be discharged.

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VAUGHAN, J. :

The jury have found, properly, that the defendant assented to the plaintiffs' request to take the coals on board at Pembroke instead of Cardiff. The effect of that agreement is to substitute Pembroke for Cardiff, but to leave the lay days to be reckoned from the 16th of December, as before.

BOSANQUET, J. :

As to the argument that there was no agreement to alter the charter-party, a request on one side, coupled with an assent on the other, is Lord Coke's *aggregatio mentium* which constitutes an agreement. The effect of that agreement is to substitute Pembroke in the charter-party for Cardiff, but not to alter the stipulation with respect to the lay days.

COLTMAN, J. :

I think the case was rightly left to the jury, and rightly decided by them. When it is found that the loading at Pembroke was assented to by the defendant, it follows that he impliedly assented to reckon the lay days from Pembroke also.

Rule discharged.

FERGUSON AND ANOTHER, ASSIGNEES OF W. H. BULLOCK,
A BANKRUPT, *v.* NORMAN.

(5 Bing. N. C. 76—89; S. C. 6 Scott, 794; 1 Arn. 418; 8 L. J. (N. S.)
C. P. 3; 3 Jur. 10.)

1838.
Nov. 16.
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A pawnbroker, who, in taking pledges, omits to pursue the course required by 39 & 40 Geo. III. c. 99, s. 6 (1), acquires no property in the pledges, and cannot maintain a lien on them against the assignees of a pawnor who afterwards becomes bankrupt.

THIS was an action of trover, brought by the assignees of a bankrupt; the defendant pleaded Not guilty; and the case having been referred to arbitration under an order of *Nisi Prius*, the arbitrator found specially for the opinion of the Court, that the plaintiffs were the assignees of the estate and effects *of William Henry Bullock, a bankrupt, under a fiat issued on the 8th of February, 1834, upon an act of bankruptcy committed the 27th of January, 1834; that the bankrupt carried on the business of a tailor; and from the 1st of November, 1831, to the 29th of September, 1832, resided at No. 5, South Place, Pimlico; and from the 29th of September, 1832, to the time of his bankruptcy, at No. 56, Rupert Street, Haymarket. While living at both those places he was a housekeeper. Pimlico is the out ward of St. George, Hanover Square, and embraces a district about four miles round. It is very populous, and contains many streets, houses, places, courts, and squares. The defendant was a pawnbroker, living at No. 51, Prince's Street, Leicester Square, where he had carried on business for some years previously to the 1st of November, 1831, and from thence to the present time. Between the 1st of November, 1831, and the 27th of November, 1833, the bankrupt himself, on different occasions, amounting altogether to 142, pledged with the defendant, as a pawnbroker, various articles of property, in some few cases for more than 5*s.*, and not exceeding 10*s.*, but in the great majority of cases for more than 10*s.*: of those pledges, sixty were at the time of the action in the possession of the defendant, upon which the sum of 80*l.* 14*s.* 11*d.* had been advanced by the defendant, and were of the value of 100*l.*; and the remaining eighty-two, upon which the sum of 124*l.* 10*s.* 5*d.* had been advanced by the defendant, had been sold from time to time after the expiration of a year from the time they were respectively pledged, and before the 27th of November, 1833: such of them as were

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(1) Repealed by the Pawnbrokers' Act, 1872 (35 & 36 Vict. c. 93). But see s. 12 of this Act.—R. C.

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pledged for more than 10*s.* were sold by auction; and were altogether of the value of 155*l.* 6*s.* 2*d.* The whole of the property so pledged belonged to the bankrupt; and on the 24th of May, 1834, before the commencement of this action, the *plaintiffs required the defendant to deliver the whole up to them, which the defendant refused to do. The defendant, pursuant to the statute 39 & 40 Geo. III. c. 99, s. 6, kept separate books, some for the entry of pledges exceeding 5*s.*, but not exceeding 10*s.*, and others for pledges above 10*s.*: in all the entries in those books, and also in the notes or duplicates given by the defendant to the bankrupt at the time of pledging, the defendant had in every instance inserted the name of Reeves as the name of the person by whom the goods were pledged: the name of the bankrupt no where appeared.

If the Court should be of opinion that the plaintiffs were entitled to recover by reason of that misdescription, the arbitrator assessed their damages at 255*l.* 6*s.* 2*d.*

The defendant had written Pimlico only, as the place of abode of the owner of the goods pledged, as well in the entries in the books, as in the duplicates given to the bankrupt at the time of pledging.

If the Court should be of opinion that the plaintiffs were entitled to recover by reason of that ground of objection, the arbitrator assessed their damages at 255*l.* 6*s.* 2*d.*

In every case of the entry of a pledge in the defendant's books, the letter L. (for lodger) was uniformly inserted, and not the letter H. (for housekeeper), except in nine cases, when neither the letter L. nor H. was inserted. If the Court should be of opinion that the plaintiffs were entitled to recover, by reason of the insertion of the letter L. in the books, instead of the letter H., the arbitrator assessed the plaintiffs' damages at 251*l.* 6*s.* 7*d.*; and if the plaintiffs were entitled to recover in the above nine cases, where neither the letter L. nor H. was inserted in the books, the arbitrator assessed the plaintiffs' damages at 3*l.* 19*s.* 7*d.*

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Among the duplicates given to the bankrupt at the *time of making the pledge, there were fifty-five which had the letter L. and not the letter H.; and the value of the property mentioned in those duplicates was 105*l.*; there were also sixty-seven duplicates which had neither the letter L. nor H., and the property mentioned on those last-mentioned duplicates was of the value of 74*l.* 4*s.* 6*d.*, upon which the sum of 64*l.* 6*s.* 9*d.* had been advanced by the defendant; part of which property, of the value of 60*l.* 3*s.* 6*d.*, had

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been sold; and the remainder, of the value of 14*l.* 1*s.*, still remained in the defendant's possession. In seven of the before-mentioned nine cases, the duplicates bore the letter L.; and the property so pledged was of the value of 3*l.* 0*s.* 7*d.*; and in the remaining two cases, the duplicates had neither the letter L. nor H., and the value of the property in those two instances was 19*s.*

The bankrupt, on the 24th of April, 1833, pledged some cloth for 10*s.* 1*d.*, which was not entered in the book kept for entry of pledges above 10*s.*; and the duplicate of it, when given by the defendant to the bankrupt, bore no number: the value of that cloth was 10*s.* 5*d.*, and it was still in the defendant's possession; and,

If the Court should be of opinion that the plaintiffs were entitled to recover in respect of that item, the arbitrator assessed the damages in respect thereof, at 10*s.* 5*d.*

Before any money was lent or advanced upon any one of the said pawnings, the defendant did, upon every occasion of such pawnings, make the inquiry as directed by the Act of Parliament, except in the two cases where neither the letter L. nor H. appeared upon the duplicates, or was inserted in the entries in the books. The defendant was informed in every instance by the person pledging, that his name was Reeves, and that he resided at Pimlico, but not in any street, place, or square, or *house with a number; and also, that he was a lodger, except in the two cases above-mentioned.

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Barstow, for the plaintiffs:

The Pawnbrokers' Act, 39 & 40 Geo. III. c. 92, s. 6, enacts, that the pawnbroker, before advancing any money on a pledge, shall enter a description of the goods in a book; the name of the person pawning them; the name of the street and number of the house in which such person shall abide, and whether lodger or keeper of the same; using the letters L. and H. for that purpose; the name and abode of the owner of the goods, according to the information of the person pawning: into all which circumstances the pawnbroker is required to inquire: that he shall number each entry; and upon taking the pledge shall give to the party pledging a memorandum corresponding with the entry. In the nine cases, therefore, in which the defendant has entirely omitted in his books the letters L. and H.; in the sixty-seven in which there have been omissions in the duplicates, and in the single case entirely omitted

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in his books, the defendant having violated the injunctions of the statute, acquired no property in the goods as against the plaintiffs, and can establish no lien. Obedience to those injunctions being required before the advance of any money, neglect of the condition precedent renders the contract void ; and this, notwithstanding the disobedience is visited with a penalty under s. 26 ; for the object of the Act was general, to prevent depredation, by rendering detection easy ; and in *Bartlett v. Viner* (1) it is laid down, that every contract contrary to a statute is void. In *Law v. Hodson* (2) it was held that the statute 17 Geo. III. c. 42, which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the *seller, if bricks be sold and delivered under the statutable size, unknown to the buyer, the seller cannot recover the value of them. And since the case of *Forster v. Taylor* (3), it may be safely advanced as a general proposition, that an act forbidden to be done, under a penalty, is in legal effect absolutely prohibited, and that the prohibition exists whether the penalty be introduced in a statute passed for a financial object, or for the general protection of society. So in *Cope v. Rowlands* (4) it was held that a broker could not maintain an action for work and labour, and commission for buying and selling stock, &c., unless duly licensed by the mayor and aldermen of the city of London, pursuant to 6 Anne, c. 16. In *Armstrong v. Armstrong* (5) Lord BROUGHAM, L. C. said, " If a person agrees with another to be a secret partner in the business of a pawnbroker, he agrees to do that which is illegal and punishable by the 39 & 40 Geo. III. c. 99, an Act containing provisions highly beneficial, and bringing the trade in question under regulations which are wholesome to the community, inasmuch as they prevent the abuse of such traffic ; regulations which will never be objected to by the respectable part of the body concerned in carrying the trade on, and which only affect those whom the police ought to watch over." And in this respect there is no difference between seeking to enforce a contract, and asserting a claim to a lien ; for *Fitzroy v. Gwillim* (6), which seemed to countenance such a distinction, has been overruled by *Wood v. Grimwood* (7) and *Hargreaves v. Hutchinson* (8).

(1) Carth. 252.

(2) 10 R. R. 513 (11 East, 300).

(3) 39 R. R. 698 (5 B. & Ad. 887).

(4) 46 R. R. 532 (2 M. & W. 149).

(5) 3 My. & K. 64.

(6) 1 R. R. 167 (1 T. R. 153).

(7) 10 B. & C. 679.

(8) 2 Ad. & El. 12.

Petersdorff, for the defendant :

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There is nothing in the case to show that the defendant took more than *5 per cent. interest; and unless he did, he is exempted, by sect. 30, from observance of the formalities prescribed by sect. 6. It is the province of a jury to say what was the nature of the contract : *Tregoning v. Attenborough* (1).

But even if he were lending money in the capacity of a pawn-broker, he has his lien on the goods for the money advanced, notwithstanding he may have failed to observe the regulations prescribed by sect. 6. Even where a claim is barred by the Statute of Limitations, it has been held that the creditor may still avail himself of a right of lien : *Higgins v. Scott* (2), *Nicholson v. Chapman* (3). The right to enforce a contract, therefore, and the right to insist on a lien, are not co-relative and co-extensive. It is true a lien cannot arise on a tortious taking : but these goods were taken on an advance of money ; and an illegal act, collateral to the loan, will not deprive the lender of his securities. Thus in *Kerrison v. Cole* (4), it was held that though a bill of sale for transferring the property in a ship by way of mortgage might be void as such, for want of reciting the certificate of registry therein, as required by the statute 26 Geo. III. c. 6, s. 17, yet the mortgagor might be sued upon his personal covenant contained in the same instrument, for the repayment of the money lent. So, in *Readshaw v. Balders* (5), a covenant in an annuity deed, made prior to the statute 46 Geo. III. c. 65, s. 115, which statute had a retrospective operation, whereby the grantor of the annuity covenanted to pay the same on the days and times specified, without any deduction in respect of the then present or any future property tax, was held to be void in respect *of its obligations on the grantor not to deduct the property tax, but not in respect of the payment of the annuity, subject to such deduction ; and in *Monys v. Leake* (6), where, in a deed of grant of a rent-charge by a rector out of his benefice, the grantor also covenanted personally to pay the rent-charge, and gave a warrant of attorney to confess judgment as a collateral security for payment, the Court refused to order the deeds to be delivered up to be cancelled.

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The cases in which the Courts have held a non-observance of a statute to constitute a forfeiture of goods, or an avoidance of a contract, are cases in which such has appeared to be the intention

(1) 33 R. R. 397 (7 Bing. 97).

(2) 36 R. R. 607 (2 B. & Ad. 413).

(3) 3 R. R. 374 (2 H. Bl. 254).

(4) 8 East, 231.

(5) 4 Taunt. 57.

(6) 8 T. R. 411.

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of the Legislature; those cases are referred to in *Cope v. Rowlands*; but in the present Act, from the circumstance that, under sect. 11, persons buying or taking in pledge unfinished goods, or linen or apparel intrusted to others to wash or mend, are to forfeit double the sum lent, and to restore the goods, and under sect. 13, where goods are unlawfully pawned, the pawnbroker is to restore them, while no such provision is made in sect. 6, it may be inferred that it was not the intention of the Legislature to avoid the contract, or deprive the pawnbroker of his lien for an omission to observe the formalities prescribed in sect. 6.

Barstow, in reply :

It sufficiently appears, from the facts found by the arbitrator, and the language used, that the defendant took these goods in the capacity of a pawnbroker; and then, in order to found a right of lien, there must be a legal contract, which here there was not, for want of observing the conditions precedent to its validity. In none of the cases cited for the defendant was the contract, as here, void *ab initio*.

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TINDAL, Ch. J. :

It appears to me in this case, that all the contracts which were entered into between the parties who pledged goods and the pawnbroker, in which the requisites prescribed by the sixth section of the Pawnbrokers' Act were not observed, are to be held void. Upon looking at that section, the requisites that are made necessary are those that are to precede the contract, and to accompany and make it out: they are not, as has been contended, collateral to the contract itself. A distinction may easily be drawn as to those duties imposed on the pawnbroker which are entirely collateral to the individual contract; and it would be too much to say, because he had not observed the enactment of the statute in such matters, that therefore the contract made by him should be void. Suppose an instance in which his name was required to be put up over the door, and some mistake had been made. A penalty is given for not putting up the name; but it would not follow that contracts entered into by an individual whose name had been incorrectly spelled, would be therefore void. However, when we look at the present section, the case is extremely simple: it enacts, that every person who, after the commencement of this Act, shall, by way of pawn or pledge, take from any person whatsoever goods or chattels of any kind soever, whereon shall be lent any sum

exceeding 5s., shall forthwith, and before he shall make, advance, or lend any money on such pawn or pledge, enter the same in a book in a particular manner. Then it goes on to describe other duties to be performed; some of which are to inquire the place of abode of the party who brings the goods, whether he be a lodger or housekeeper, and to put a certain mark according to the fact, H. or L., on entering the loan. And it goes on to direct that the pawnbroker shall, at the time of taking any pawn or pledge, give a duplicate in the manner there *pointed out. It appears, therefore, that there are acts to be done by the pawnbroker before and at the time of entering into the contract; and it is quite evident that the statute was passed not only for the purpose of protecting the numerous parties who borrow money on small pledges, but also the public, against frauds committed on third persons, the real owners of goods, by pledging their property without their consent; for the pawnbrokers' entries would facilitate the detection of any fraud or robberies so committed. This, therefore, being the object and intention of the Legislature, and the requisites being such as are to be performed at the time of, and previously to, entering into the contract, I think the contract must be held to be void, notwithstanding there are specific penalties for the omission of such requisites. The late case of *Cope v. Rowlands* is completely in point, and reviews all the preceding cases, beginning with *Bartlett v. Viner*, which alone would be sufficient to determine the present case.

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Then comes the question, whether, though the contract itself be void, the party may not have a lien on the goods.

But a lien can only arise in one of three ways; either by an express contract; by a general course of dealing in the trade in which the lien is set up; or from the particular circumstance of the dealing between the parties. The two first are out of the question here; and there is nothing in the dealing between the parties but the ordinary circumstances between pawner and pawnee. So that it comes round to this, that, if the contract be void, the lien is void also; and I see no ground on which the right of the pawnbroker to resist this action can be set up.

It is said that there are some cases in which, though the contract has been held to be void, a party has been allowed to recover on it; as in *Kerrison v. Cole* and **Monys v. Leake*. In *Kerrison v. Cole* a mortgage was given on a ship, without reciting the certificate of registry, under the Registry Act; and it was held that

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there was nothing in that circumstance to impeach a *bonâ fide* loan of money at legal interest; that though the security given on the ship was invalid, yet that the common law contract for money lent and interest to be paid, might still be enforced. In the same way, in the case of *Monys v. Leake*, though the statute of Elizabeth made void the contract as to the ecclesiastical benefice, yet the repayment of the money might be enforced at common law, notwithstanding the party had lost the security of the benefice. So, in the present case, if there had been any other contract which could have been set up and acted upon as a legal contract, it would have fallen within the principle of those cases; but there is no contract here except that which was entered into under the purview of this Act, and which is void for the reasons I have stated. I think, therefore, that the plaintiffs are entitled to recover so much of these goods as are subject to the specific objections which have been pointed out.

VAUGHAN, J.:

I am of the same opinion. Upon the true construction of the Pawnbrokers' Act, and the authority of decided cases, we cannot hold that the defendant has any lien. It is urged, on the part of the defendant, that he has his lien, because, in the first place, it does not appear that he has been acting as a pawnbroker; and the thirtieth section of the Act of Parliament declares that the Act shall not be construed to extend to any person who shall lend any money on a pledge at the rate of 5 per cent. But, on looking at the manner in which the case is stated, it does not appear there has been a single instance in which the pledge has been redeemable on the terms of paying 5 per cent. *interest. Then, the sixth section appears to me to create a clear condition precedent; the pawnbroker must comply with the requisites of that section before he can acquire any right to make any legal contract. As he has failed to do so, the question arises, what is the effect of this violation of the statute? Is it simply that the party is to be subject to a penalty, and still to retain his lien? But how could he acquire a lien if the contract were an illegal contract? The case cannot be distinguished in principle from that of *Cope v. Rowlands*. In the case of the butter contract, where particular penalties were inflicted on parties for not marking their casks or packages with their names, it was contended that though they might be subject to the penalty, yet the contract

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was not void, and that they might maintain their action for the price of the butter ; but the Court of Queen's Bench held that the provision which required the vessel to be branded with the vendor's name, being passed for the protection of the public against fraud, indirectly prohibited the sale of butter in vessels which were not properly marked ; and that the contract of sale was void, though the party might also be liable to a penalty. It appears to me, therefore, on the principle of the cases already decided, and the provisions of this Act of Parliament, that no right of property passed to the pawnbroker under the circumstances of this case ; and consequently that he had no lien.

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BOSANQUET, J. :

I am of the same opinion. It appears to me to be clear, by the statement of the case, that the transactions on which the case is founded were transactions of loan, on a contract of pledge, with the defendant, as a pawnbroker ; for it is expressly found that the bankrupt himself, on different occasions, amounting to 142, pledged with the defendant, as a pawnbroker, various articles of property for certain sums.

The question now is, whether such transactions were or were not valid. The sixth section of the Act shows the express intention of the Legislature, that, wherever any property is taken in pawn by a pawnbroker for the loan of money, a certain course shall be pursued ; and unless that course be pursued, the contract is prohibited by law. Being prohibited by law, it is void, whether there be or be not any particular penalty annexed to it. If the transaction itself becomes illegal, this consequence necessarily follows, as it appears to me, that no property can pass to the pawnbroker in the thing pledged. If no property can pass in the pledge, then the property remains in the pawner, and he will be entitled to recover. There may be cases, undoubtedly, in which that which is prohibited is collateral to the subject of the contract ; but it is unnecessary now to define to what extent that doctrine may go, for it appears to me sufficient in the present case to say, that what the Act requires here is expressly directed by the Legislature to accompany the contract. Under these circumstances, I think that the plaintiffs are entitled to recover.

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COLTMAN, J. :

The defendant must be considered to have received the goods as

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a pawnbroker. Now a pawnbroker is a person who lends money on usurious interest, and on interest which *primâ facie* would be illegal. The contract which he makes and enters into could not be enforced except on the foundation that he complied with the requisites of the Act of Parliament. But, not to put it on that which might be considered a strict ground to go upon, it appears to me that the express terms of the sixth clause make a compliance with its regulations a condition precedent to be performed before the pawnbroker can lend his money; and, if he fails to do that, he becomes liable to the penalties *imposed by the 26th section. The Court, in general, is not forward to consider a matter as a condition precedent, unless it be expressly made so. Here in terms it is made so. The Act has prohibited the loan to be made until the preceding regulations have been complied with. Therefore, it appears to me, that in this case the contract was invalid, and that the plaintiffs are entitled to recover.

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Judgment for the plaintiffs.

1838.
Nov. 21.

PILMORE v. HOOD.

(5 Bing. N. C. 97—110; S. C. 6 Scott, 827; 1 Arn. 390; 8 L. J. (N. S.) C. P. 11; 7 Dowl. P. C. 136.)

[97]

Defendant being about to sell a public-house, falsely represented to B., who had agreed to purchase it, that the receipts were 180*l.* a month: B. having, to the knowledge of defendant, communicated this representation to plaintiff, who became the purchaser instead of B.: Held, that an action lay against defendant at the suit of plaintiff.

THE declaration stated, that before the committing of the grievances by the defendant, as hereinafter mentioned, by a certain indenture of lease, bearing date the 25th of September, 1819, made between the Reverend James Archer and others of the one part, and *Robert Simmonds of the other part, for the considerations therein mentioned, the lessors demised to R. Simmonds, his executors, administrators, and assigns, all that messuage or tenement, situate, &c., and then used or occupied as a public-house, or liquor shop, together with all appurtenances thereto belonging; to hold the same unto the said R. Simmonds, his executors, administrators, and assigns, from the 25th March then last past, for the term of twenty-nine years, at the yearly rent of 500*l.* payable quarterly, and subject to the covenants and agreements therein contained; that by divers mesne assignments, the said indenture of lease and the premises thereby demised afterwards

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became legally and absolutely vested in the defendant for the rest, residue, and remainder of the term; and the defendant then carried on the trade and business of a publican and licensed victualler at the said messuage and premises: that afterwards, to wit on, &c., one Robert Bowmer had contracted and agreed with the defendant for the absolute purchase of the said lease, with the good will, and possession of the dwelling-house and premises thereby demised, and at and for a certain price or sum of money, to wit, 1,175*l.*; but no assignment had been made to him: that the defendant, at and before the making of the agreement with R. Bowmer, falsely, fraudulently, and deceitfully pretended and represented to R. Bowmer, that the trade of the public-house had been and then was 180*l.* per month, all retail over the counter: that Bowmer not being able to complete the purchase, it was afterwards, to wit, on, &c. agreed by and between the plaintiff, Bowmer, and the defendant, that the plaintiff should become the purchaser of the premises in the room and stead of Bowmer; and at and before the making of the last-mentioned agreement, Bowmer communicated to the plaintiff that the defendant had, at and before the making of the first-mentioned agreement with him, represented that *the trade of the public-house had been and then was 180*l.* per month, all retail over the counter: of all which premises the defendant at and before the making of the agreement secondly mentioned, had notice. That the plaintiff, confiding in the representations so made by the defendant, then agreed to become the purchaser of the premises, at and for a certain price or sum of money, to wit, 1,175*l.*, in the room and stead of R. Bowmer; that the plaintiff afterwards, to wit, on &c., paid the said sum of 1,175*l.* to the defendant for the same; but that the trade of the said public-house had not been nor was 180*l.* per month, all retail over the counter, as the defendant at the time of his making his false and deceitful representation, and also at the time of his entering into the last-mentioned agreement, well knew: that the defendant by means of the premises, falsely and fraudulently deceived the plaintiff in the said sale, and thereby the premises had become and were of no use or value to the plaintiff: that the plaintiff had sustained great trouble and expense, to wit, an expense of 1,000*l.* in and about the carrying on the business of a publican and licensed victualler in the messuage and premises, and had sustained great loss in disposing of the premises; to the plaintiff's damage, &c.

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Plea. That the defendant did not authorise Bowmer to communicate to the plaintiff, that the defendant had pretended and represented to Bowmer that the trade of the public-house in the declaration mentioned had been and then was 180*l.* per month, all retail over the counter, in manner and form as in the declaration was alleged ; and that, the defendant was ready to verify.

[*100] Demurrer ; for that it was not averred in the declaration that the defendant authorised Bowmer to communicate to the plaintiff that the defendant had pretended and represented to Bowmer that the trade of the public-house had been and then was 180*l.* per *month, all over the counter : that it was not necessarily understood, intended, or implied that such an averment was contained in the declaration, and that it was not necessary to the maintenance of the action that the declaration should contain such an averment : that the plea amounted to an immaterial traverse, and was no answer to the declaration.

Joinder.

[After argument:]

[104] TINDAL, Ch. J. :

The main question between the parties is, whether there is a substantive fraud stated on the face of the declaration. Looking at the general statement of the declaration, it amounts to this, that the defendant, being possessed of a public-house, had agreed with one Bowmer to sell it to him for the sum of 1,175*l.* ; and that, in the course of the contract or negotiation for that sale, he had made a false and fraudulent representation to him as to the profits that had been obtained in the house. It is alleged that Bowmer elected to enter into the contract, confiding in such fraudulent representation : that Bowmer, not being able to complete the purchase, the plaintiff Pilmore was put into his place, and went on with the agreement which Bowmer had entered into : that, in the course of the negotiation between Bowmer and Pilmore, Bowmer had repeated the communication which had been made to him by the defendant : and (which is an important ingredient in this case) that of all this the defendant had notice. After such notice, he goes on with Pilmore the plaintiff, *and allows him to complete the contract, receiving the money and executing the assignment to him. That appears to me to contain a substantive allegation that there was a fraud or deceit practised by the allowance and

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consent of the defendant upon the plaintiff, through which the plaintiff has incurred certain damage.

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The first objection made by the counsel for the defendant was, that it did not appear on this declaration that the contract which the plaintiff afterwards entered into with the defendant was the same contract as that which Bowmer had entered into with him. But I am unable to read the declaration itself without understanding that the plaintiff took on himself the performance of the contract which had been entered into with Bowmer, with all its parts and circumstances, the price as well as the premises to be conveyed; for, after stating that "Bowmer had contracted with the defendant for the absolute purchase of the lease, good-will, and possession of the dwelling-house and premises thereby demised, for 1,175*l.*, but that no assignment had been made to him," the declaration goes on to allege "that, Bowmer not being able to complete the said purchase, it was afterwards agreed by and between the plaintiff Bowmer and the defendant, that the plaintiff should become the purchaser of the premises in the room and stead of Bowmer."

Now, I cannot understand that, as any other than as transferring to the plaintiff the agreement which had not been completed as between Bowmer and the defendant. Here, then, we have a case in which, after the defendant has had notice that the communication, false and fraudulent as it was to Bowmer, had been repeated to Pilmore the plaintiff, he goes on with Pilmore, takes the money from him, and executes the assignment.

It seems to me that the object and motive on the part *of the defendant is the same whether the contract had remained with Bowmer or had been transferred to Pilmore; his object was to obtain a larger sum for the public-house than he knew it was worth; the means employed are the same; for it is the same false and fraudulent representation that acts on the mind of the plaintiff; and the result is the same, for he gets from the plaintiff a sum which he was conscious was larger than the house was worth. The means and end being the same, I am unable to distinguish between this case, and the case as it would have been if the contract with Bowmer had gone on.

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In *Ward v. Weeks* (1) nothing had been done by the defendant, nor had the words spoken by him occasioned the special damage of which the plaintiff complained. But here, after the communication has been made to the plaintiff, something (and that very important)

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is done by the defendant, for he goes on with the contract itself, and completes it with the plaintiff; thereby availing himself of the representation which he was conscious he had made. It seems to me that the case falls precisely within the principle laid down in *Langridge v. Levy* (1), in which the Court says, "We do not decide whether the action would have been maintainable if the plaintiff had not known of, and acted upon, the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of sale, to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of his fraud, whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased."

[107] This case falls within the principle so laid down, and therefore I think the action maintainable.

Then, if the declaration is sufficient, I think the plea that "the defendant did not authorise Bowmer to make the communication," is insufficient; for it does not meet the whole of that which is alleged in the declaration: he had notice that the communication had been made; and even if he never authorised Bowmer to make it, yet, knowing it had been made, he stood by and allowed the purchase to be completed, in order that he might profit by it; so that the issue raised by the plea is not material.

VAUGHAN, J. :

I am of the same opinion. I think that a fraud has been practised upon the plaintiff; that that fraud has resulted in damage; and is sufficiently averred on the face of the declaration.

After stating the representation made to Bowmer, it alleges that it was agreed between all parties that the plaintiff should stand in the shoes of Bowmer; "of all which the defendant, at and before the making of the agreement secondly above mentioned, had notice:" that is, that, before the agreement was entered into between the plaintiff and the defendant, the defendant well knew that the communication made by him to Bowmer had, in point of fact, whether with or without authority, been made to the plaintiff.

Then arises the question, whether a party, having entered into a contract, the effect of which would be likely to be influenced by such a representation, shall be deemed to have committed no fraud

if the contract be transferred to a third person. It appears to me there could not be a much grosser fraud than in this party standing by and allowing a second contract to be entered into under the circumstances stated.

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The case of *Hill v. Gray* (1) goes much further; for there the defendant only stood by and allowed the *plaintiff to contract under a delusion which he might have removed. I am of opinion therefore that this declaration is sufficient; and that the plea is not a sufficient answer to it.

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BOSANQUET, J. :

I am of the same opinion. This is an action for deceit. The question is, whether upon the facts that appear upon the record, the plaintiff has or has not been fraudulently deceived by the defendant. And I think when the circumstances of the case as they appear on the record are stated in order of time, though not exactly in the order in which the averments in the declaration and plea are found, that there can be no doubt on the subject.

It appears that the defendant entered into a contract of sale of a public-house with a person of the name of Bowmer: that when that agreement was entered into, he represented to Bowmer that the public-house was of a certain value in respect of its trade, and that representation he knew to be false at the time that he made it. After this agreement had been entered into with Bowmer, Bowmer finding himself unable to complete the contract, entered into a negotiation with the plaintiff Pilmore, and informed him what representation he had received of the value of this public-house from the defendant: and taking it according to the plea, that Bowmer had not any particular authority from the defendant to make such communication to Pilmore, the defendant had notice that the information had been given to Pilmore, and it is averred, that both at the time of the original agreement with Bowmer, as also at the time of the agreement which subsequently took place with Pilmore, the defendant knew that that information was false. Then, having notice that that communication had been made, and knowing at the time that it was false, he enters into a *new agree-

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of these facts, not to see that the defendant when he entered into that contract with Bowmer, having thus himself made the fraudulent representation, and knowing it to have been communicated to the person with whom he was about to contract a second time, then withholding an explanation, or denial of his authority for the communication, and suffering the plaintiff on the faith of the communication to enter into that contract, was not as much guilty of a deceit on the plaintiff as if he had in terms repeated the statement himself. On these grounds, without entering further into the case, I think this action may be maintained. The case of *Langridge v. Levy* is a strong authority on the subject.

COLTMAN, J. :

I am of the same opinion. It appears from the case decided by Lord ELLENBOROUGH, *Hill v. Gray*, that if a party makes a contract with another, whom he knows to be labouring under a delusion materially affecting that contract, and suffers him to be operated upon by that delusion, the contract is void. That seems to establish the proposition that there may be a fraudulent representation sufficient to avoid a contract, and of course sufficient to be the ground of an action, without actual active declaration from the party contracting. There is a sort of tacit acquiescence in a fraudulent representation, here ; indeed it is stronger than that, because it is a representation originally flowing from the party himself.

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It seems, therefore, to be clear, that if the defendant was aware at the time of the contract, that the plaintiff believed the truth of the representation that Bowmer *had made, he was aware that a fraud was committed on the plaintiff. The case seems to be free from difficulty. The only doubt that struck my mind on the subject was, whether the mere averment that he had notice that such representation had been made, without an averment that he supposed the defendant to be acting on the faith of that representation, was sufficient. But upon consideration, I think that this imports *primâ facie*, that he must be taken to have sanctioned the representation ; and when it is coupled with the fact that it did impose on the party, it must be taken against the defendant, that he supposed the representation had been believed.

Under these circumstances, I think there has been a representation by the defendant sufficiently fraudulent to entitle the plaintiff to maintain this action.

Judgment for the plaintiff.

BOTTOMLEY v. FORBES (1).

(5 Bing. N. C. 121—128; S. C. 6 Scott, 866; 1 Arn. 481; 8 L. J. (N. S.) C. P. 85; 2 Jur. 1016.)

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Upon a charter-party engaging to pay 4*l.* 15*s.* per ton for goods shipped at Bombay for London, cotton to be calculated at 50 cubic feet per ton: Held, that evidence was admissible for defendant of a usage to pay according to the measurement taken at Bombay, before the goods are loaded. Also, that plaintiff was entitled to show, in reply, that his captain objected to receive the goods at the Bombay measurement; measured them when on board; and delivered an account of that measurement to the shippers.

ASSUMPSIT, on a charter-party, for freight. According to the terms of the charter-party, the shipper was to pay 4*l.* 15*s.* per ton for all goods shipped at Bombay for London, cotton to be calculated at fifty cubic feet per ton, and all other goods according to the East India Company's scale.

At the trial before Coltman, J. it appeared that the defendant shipped on board the vessel, at Bombay, 1,575 bales, and thirty-two half bales, of cotton. They were compressed in the warehouse at Bombay by an hydraulic press, and, being measured immediately after pressure, amounted, upon the bill of lading, according to the calculation of fifty cubic feet per ton, to 355 tons. The cotton, by its own elasticity, has a tendency to expand, and after being unloaded at London, it amounted, according to the above calculation, to 457 tons.

For the defendant it was contended, that, as nothing was said in the charter as to the place where the measurement was to be taken, it must be regulated by the usage or custom, which, as he alleged, was, to pay according to the measurement at the screw at Bombay.

A witness, who was at Bombay at the time of the shipment, proved the manner in which cotton is pressed there. The bale is at first from ten to eleven feet high: in the first place, the cotton is trod down, by men, into boxes; it is then placed under wooden screws, and reduced to about three feet high; afterwards it is put under an iron worm-screw, with thirty-five men to the screw, and is, by these means, brought down to about *one foot seven or eight inches, and then corded very strongly: it is in this state that the measurement is taken. It appeared that the bales were shipped within twenty-four hours after the measurement. It was stated by the witness, that the expansion was greatest immediately after the

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(1) Cited and followed in *Buckle v. Knoop* (1867) L. R. 2 Ex. 125, 130, 36 L. J. Ex. 49, 53, 54 (affirmed Ex. Ch. L. R. 2 Ex. 333, 36 L. J. Ex. 223).—R. C.

BOTTOMLEY bales were taken from the screw, depending more or less on the
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 FORBES. quality of the lashings; that the cotton continued to expand for
 twenty-four hours, and not much after that time.

Upon a question being asked this witness, as to the usage,

Wilde, Serjt. objected to any evidence of usage to pay freight according to the measurement at the screw or warehouse of the shippers; contending, that where nothing is said on the subject in the contract, by law, the port of delivery is the place where the quantity of goods is to be ascertained and freight paid.

COLTMAN, J., admitted the evidence.

The witness then stated, that he was acquainted with the general mode of shipping cottons from Bombay to London, and that the general course was to pay freight at the rate of fifty cubic feet to the ton, according to measurement at the screw, as in the present instance. That it was the usage to call on the captain to sign bills of lading, with the measurement inserted; that the captain in this case, had refused to admit the screw measurement; that there had been great disputes and differences as to the mode of measuring cotton; that scarcely any ship was loaded without differences, insomuch that it had been considered necessary to remodel the whole of the company's scale; and that the new scale was to come into use on the 7th of April, subsequently to the shipment in question. There were three modes of measurement. 1st. By taking $4\frac{1}{2}$ bales to the ton. 2nd. By taking 14 hundred-weight to the ton. 3rd. By taking 50 cubic feet to the ton. The principal disputes arose *in consequence of the mode of measuring the bales; the callipers being imperfect, and some persons insisting on the measurement over the ropes. The witness mentioned three ships in respect whereof there had been differences, in consequence of vagueness in the charters.

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Several other witnesses also proved, that it was the usage to pay according to the measurement at the screw at Bombay, when nothing was said in the charter as to the place of measurement: that the expansion of the cotton would be considerable after landing it in London, which would make great difference in the measurement; and that the cotton could not be put back into the hold: that the bales would expand three or four cubic inches within the first twenty-four hours: and that the expansion would

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be greater within the first twenty-four hours than at any subsequent period; but that the cotton would expand every time it was removed. That there was a difference of 20 per cent. between the measurement in this country and at Bombay: that the charters were generally made at Bombay; and that it was usually stipulated that the measurement should be Bombay measurement.

All the witnesses stated, that the course was for the measurement to be indorsed on the bill of lading, as in the present instance, and the freight to be paid according to that measurement.

The defendant's case having been concluded,

Wilde called the captain on the part of the plaintiff, and proposed to ask him, first, whether he refused to receive the goods according to the Bombay measurement; and, secondly, to prove the measurement of the goods when they came on board the ship. *Wilde* contended, that this proof was rendered necessary by the defendant's evidence, which went to impeach the measurement at London.

It was objected for the defendant, that this evidence ought to have formed part of the plaintiff's original case: and it was so held by the learned Judge.

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Wilde also tendered evidence to show, that when the goods were brought alongside, the captain having objected to receive the measurement at the screw, requested the shippers to attend the measurement of the goods on board the ship: also, evidence of a bill of lading delivered to the shippers, stating the measurement on board as well as the measurement at the screw, and that these measurements were written by the defendant's agents, in order to show that the parties did not act upon the usage; but the learned Judge held, that this also should have formed part of the original case.

The defendant having paid into Court freight, calculated upon 355 tons, a verdict was found for him, which,

Wilde obtained a rule *nisi* to set aside, on the ground, that the language of the charter-party being unambiguous, the evidence of usage ought not to have been admitted: *Moller v. Living* (1); and that at all events the evidence offered in reply ought not to have been rejected.

(1) 4 Taunt. 102.

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Sir W. W. Follett and R. V. Richards showed cause :

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No place of measurement being stated in the charter-party, there is a latent ambiguity in that respect, which may be cleared by evidence : but, independently of that, the principle established by all the cases is, that the construction of mercantile contracts shall be agreeable to the usage of trade in general, and of the particular trade to which the contract relates : 2 Phillips on Evid. 738, 764. *Haynes v. Halliday* (1), *Bold v. Rayner* (2), *Benson v. Schneider* (3), *Donaldson v. Forster* (4), *Taylor v. Briggs* (5), *Gibbon v. Young* (6), *Smith v. Wilson* (7). Unless such evidence were admitted, it would be impossible to determine here, whether the measurement should be at Bombay, on board the ship, or in London. In *Moller v. Living* the contract was unambiguous, to pay freight according to the number of lasts ; and though it appeared that the last at Dantzic, where the cargo was shipped, was smaller than the English last, the bill of lading described the lasts as English.

And the evidence offered in reply, was properly excluded, for it was not adduced to impugn the existence of the custom, but to show that the captain protested against the measurement. His protest could not affect the construction of the contract.

Wilde and Martin, in support of the rule :

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The usage of trade is only called in to aid in the construction of mercantile contracts, where there is an ambiguity occasioned either by the words of the contract, or by extrinsic circumstances : as to explain the meaning of the word bale, which may be of cotton, skins, or other articles ; or, where a ship is to depart with convoy, the place where she shall join it. But where there is no ambiguity in the instrument, the usage of trade cannot be called in to control it : thus in *Noble v. Durell* (8), the Court held that, though there might be a valid custom to sell butter by the yard or lump, containing any given number of ounces, a custom that the pound of butter should weigh eighteen ounces was bad, because the word pound can only be applied by law to a measure of twelve or sixteen ounces. So in *Yates v. Pym* (9), *it was held, that on a warranty of prime singed bacon, evidence was not admissible of a practice in

(1) 33 R. R. 580 (7 Bing. 587).

(2) 46 R. R. 322 (1 M. & W. 343).

(3) 7 Taunt. 272.

(4) Abbott on Shipp. 222.

(5) 2 Car. & P. 525.

(6) 19 R. R. 510 (8 Taunt. 254 ; 2

Moore, 224).

(7) 37 R. R. 536 (3 B. & A. 728).

(8) 3 T. R. 271.

(9) 16 R. R. 633 (6 Taunt. 446).

the bacon trade, to receive bacon to a certain degree tainted, as prime singed bacon. Upon the same principle, in *Parkinson v. Lee* (1), upon a sale of hops by the sample with a warranty that the bulk of the commodity answered the sample, it was held, that the law did not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given. *Donaldson v. Forster*, therefore, where, in the face of a charter-party which gave the merchant the exclusive privilege of the cabin, Lord KENYON admitted evidence of a usage for the master, under a charter-party so worded, to take out a few articles for private trade, cannot be reconciled with any of the other decisions, and, if it were law, would render it impossible for any parties, even advisedly, to enter into an express contract incompatible with usage (2). In *Haynes v. Halliday* the question was only as to the proper mode of stowing a boat: there was nothing in the contract to call on the master to stow it in a way inconvenient to the navigation of the ship. In *Bold v. Rayner* there was a variance between the bought and sold note, which could only be explained by the usage of trade. In *Benson v. Schneider*, the defendant, who was to furnish a full and complete cargo of cotton, not exceeding what the ship could reasonably stow, had clearly furnished less than she could stow. In *Taylor v. Brigg* the question turned on the meaning of the word bale, in which there was a latent ambiguity: and in *Gibbon v. Young*, the term "freight measurement" was also ambiguous. In the present case there is no ambiguity in the agreement that fifty cubic feet shall go to a ton; and by law, the place of measurement is always the port of delivery. At Bombay, the measure may vary according to the power of the shipper's screw, but the plaintiff ought to be paid for what he delivers at the port of delivery. Upon a contract at Bombay to deliver twenty tons of tobacco in London, the merchant could not allege as an excuse for nonperformance that the article had shrunk to fifteen tons during the voyage; nor a tenant who had engaged to pay a rent of twenty quarters of wheat, that it had shrunk to fifteen after threshing and before delivery.

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By this usage, therefore, the defendant sought to vary the effect of his contract to the prejudice of the plaintiff: but at all events the usage could only bind persons who were cognisant of it from carrying on the same trade; and it did not appear that the plaintiff was ever in the trade.

(1) 6 R. R. 429 (2 East, 314).

(2) See Starkie, Evid. 556.

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Then, as to the evidence offered in reply, it would not have been admissible if offered in chief, for it was to show in answer to the defendant's case, the varying nature of the measurements, and that the captain had protested against being bound by them.

Cur. adv. vult.

TINDAL, Ch. J.:

At the conclusion of the argument in this case, we stated our opinion, that, so far as related to the first objection, we thought the case fell within the general rule, that, where a doubt was raised by evidence upon the meaning of a mercantile contract, evidence was admissible of the usage or course of trade at the place where the contract was to be carried into effect, to explain or remove such doubt; and we still continue of that opinion, and hold the evidence, which was given by the defendant at the trial of this cause, to be admissible.

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But, with respect to the evidence tendered by the plaintiff in the way of reply, we think such evidence ought to have been received. For, as it appears to us, *the evidence tendered had a direct bearing on the point, whether the usage set up was a reasonable usage or not. Evidence of the extent of the difference between measurement on the merchant's premises, and measurement at the time of shipment, might be material to enable the Judge to form his opinion upon the reasonableness of the usage; and, if the usage should appear to be in a high degree unreasonable on this account, such evidence might also have weight with the jury on the question, whether the usage did or did not exist in fact.

We think, therefore, upon this ground, the cause must go down again to a new trial.

Rule absolute.

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REEVES v. CAPPER AND ANOTHER (1).

(5 Bing. N. C. 136—141; S. C. 6 Scott, 877; 1 Arn. 427; 8 L. J. (N. S.) C. P. 44; 2 Jur. 1067.)

W., captain of a ship, pledged his chronometer, then in the possession of the makers, to defendants, the owners of the ship, in consideration of their advancing him 50*l.*, and allowing him the use of the instrument during a voyage on which he was about to depart: after the voyage he placed it at

(1) Cited and followed by LINDLEY, L. J. in *Mills v. Charlesworth* (C. A. 1890) 25 Q. B. D. 421, 425, 59 L. J. Q. B. 530, 532. And see other authorities there referred to; also *Donald v.*

Suckling (1866) L. R. 1 Q. B. 585, 35 L. J. Q. B. 232; *Hilton v. Tucker* (1888) 39 Ch. D. 669, 57 L. J. Ch. 973; *London & N. W. Bank v. Poynter* [1895] A. C. 56, 62.—R. C.

the makers, and there pledged it to plaintiff, for whom the makers, being ignorant of the pledge to defendants, agreed to hold it. The money advanced by defendants not having been repaid: Held, that the property in the instrument was in defendants.

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Issue under the Interpleader Act, to try the right to a chronometer in the possession of Messrs. Barraud, against whom an action of trover had been brought to recover the value of it. At the trial, it appeared that one Wilson, the original owner of the chronometer, and captain of the ship *Don Giovanni*, on the 23rd December, 1836, being about to proceed on a voyage, obtained an advance of money from the defendants, the owners of the ship, on signing the following document, addressed to them: "In consideration of your advancing me 100*l.*, on account of this voyage, instead of the usual advance of 50*l.*, I make over to you, as your property, until the said sum is repaid, my chronometer and all my nautical instruments, now on board the *Don Giovanni*, you allowing me the use of the same for this voyage." At the time of making this agreement, the chronometer was in the possession of Messrs. Barraud, the makers. After it was signed, Wilson went, accompanied by the defendant's clerk, to Messrs. Barraud's; the clerk remained outside the shop while Wilson went in; he, on coming out, gave the chronometer to the clerk; the clerk redelivered it to Wilson, who took it on the voyage. On his return in July, 1837, the chronometer was taken back to Messrs. Barraud, where it remained. The plaintiff, an attorney, was employed by one Wain to execute against Wilson a *fi. fa.* at the suit of Wain: finding Wilson in great distress, the plaintiff agreed to withdraw the execution, and to settle with Wain, upon Wilson's signing the following document: "24th August, 1837. Messrs. Barraud—Deliver to C. Reeves *my chronometer, No. 22, which his clerk will explain the reason for doing. It will remain in your hands, as his property, until the arrangement of some little transactions between us; therefore, you will please to keep it still going, as I shall have it replaced in my name in a few days." This document had no stamp. The plaintiff's clerk took it to Messrs. Barraud, who thereupon agreed to hold the chronometer for the plaintiff. The plaintiff's clerk, with a view of vesting the possession in the plaintiff, afterwards took the chronometer into his hands and re-delivered it to Messrs. Barraud. The Barrauds had no notice of the transactions between the defendants and Wilson, until November, 1837, when an entry was made in pencil of the name of

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Capper, opposite the entry of the chronometer in their books. The jury found that the chronometer was the property of the defendants, but that Messrs. Barraud had no notice of their claim until after the delivery of the document of 24th August, 1837. Under these circumstances, a verdict was taken for the plaintiff, with leave to move to enter a verdict for the defendants. In Easter Term,

Wilde, Serjt. obtained a rule *nisi* accordingly, on the ground that the prior title to the chronometer was in the defendants. He also took three other objections to the verdict: first, that the document given by Wilson to the plaintiff had no stamp; secondly, that no consideration appeared on the face of it; thirdly, that there was no consideration in fact: but as these points are not noticed in the judgment of the Court, the argument upon them is omitted.

In this Term,

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Kelly and *Petersdorff*, who showed cause, contended that the transaction between Wilson and the defendants *was merely a pledge of the chronometer as a security for the repayment of the 100*l.* advanced; and that, by re-delivering the instrument to Wilson, the defendants lost their lien, and were left to their action on the agreement: Wilson, therefore, being absolute proprietor of the instrument, and the defendants having lost their lien, the plaintiff had a good title under Wilson. Even if the possession of Wilson, during the voyage, could be esteemed the possession of the defendants, yet, upon the re-delivery to Barrauds, after the voyage, the defendants lost their lien. If Barrauds had advanced money on the instrument, the defendants could never have claimed against them, after allowing the deposit in Wilson's name; and if Wilson could confer title on Barrauds, he could equally confer it on the plaintiff. The defendants could only claim a property in the chattel by possession or under a deed: *Kinlocke v. Craig* (1), *Reed v. Blades* (2), *Irons v. Smallpiece* (3), *Ryall v. Rolle* (4); and as they were without either, the plaintiff was entitled to recover.

Wilde and *Talfourd*, Serjts., in support of the rule, referred to *Ogle v. Atkinson* (5), to show that the Barrauds were justified in withholding the chronometer from the party who delivered it to them, if it was the property of another, and contended that the

(1) 1 R. R. 664 (3 T. R. 119, 783).

(2) 5 Taunt. 212.

(3) 21 R. R. 395 (2 B. & Ald. 551).

(4) 1 Atk. 165.

(5) 15 R. R. 647 (5 Taunt. 759).

absence of possession did not invalidate the assignment to the defendants, although in some cases it might be evidence on which a jury would have to say whether or not the assignment was *bonâ fide*: *Martindale v. Booth* (1), *Reed v. Wilmot* (2); for the possession of Wilson during the voyage was the possession of the defendants, and consistent with *the agreement between them; and, in like manner, the deposit at Barrauds, after the voyage was over, was a deposit on behalf of the defendants, it being usual to place ship chronometers, in the interval between one voyage and another, in the hands of the maker. There was nothing, therefore, to divest the property which had been once transferred to the defendants; and as the plaintiff's claim was subsequent to that transfer, the rule must be made absolute.

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Cur. adv. vult.

TINDAL, Ch. J.:

The question which has arisen upon the motion for setting aside the verdict in this case appears to us to turn entirely upon the legal effect of the contract under which the chronometer was delivered by Wilson, the then owner, to Messrs. Cappers on the 23rd of December, 1836. And it appears to us, upon the evidence, that Messrs. Cappers by the delivery of the chronometer to their clerk on that day, upon the terms of the special contract entered into between Wilson and them, acquired the legal property in the chronometer, to be held by them as a security for the repayment of 50*l.*; and that Wilson had nothing left in him but the reversionary property in the chronometer, to come into possession after such repayment had been made.

The chronometer was delivered to Messrs. Capper, and it was delivered for a valuable consideration, and this distinguishes (3) the present case from those, in which it has been held, that a verbal gift of chattels, unaccompanied with delivery of possession, passes no property to the donee: *Reed v. Blades* (4), *Irons v. Smallpiece* (5). Further, the chronometer was delivered under a written agreement; and although such agreement not being under seal, that circumstance becomes *immaterial as to the question of property, yet being a written agreement, it proves with precision and accuracy

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(1) 37 R. R. 485 (3 B. & Ad. 498).

(2) 7 Bing. 577.

(3) This distinction is adverted to and confirmed by FRY, L. J. (delivering the joint judgment of BOWEN, L. J.,

and himself) in *Cochrane v. Moore* (1890) 25 Q. B. D. 57, 61, 59 L. J. Q. B. 377, 379.—R. C.

(4) 5 Taunt. 212.

(5) 21 R. R. 395 (2 B. & Ald. 551).

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the object of the delivery, and the nature of the interest intended to be passed. "In consideration of your advancing 100*l.* instead of 50*l.*, I hereby make over to you, as your property, until that sum be repaid, my chronometer, &c. you allowing me the use for this voyage." At the moment, therefore, of the delivery to Messrs. Capper's clerk, the property vested in Messrs. Capper for the purpose and upon the condition mentioned in the written agreement, which condition has never been performed by repayment of the money.

Then arises the point upon which the plaintiff rests his claim to the chronometer under the subsequent pledge to him, for a valuable consideration; namely, that the possession of the chronometer having been afterwards parted with by Messrs. Capper, and restored, as it is contended, to Captain Wilson, the property of Messrs. Capper in it was entirely lost, either on the principle, that the agreement with Messrs. Capper must be held fraudulent and void, as possession did not accompany it; or upon the ground, that where the party to whom a personal chattel is pledged, parts with the possession of it, he loses all right to his pledge. As to the first objection to the title of the defendants, the want of possession, under the agreement, can at the utmost amount to no more than a ground of fraud to be submitted to the jury; and no such question was made at the trial; and indeed the answer to the objection is sufficiently obvious, that the parting with the possession followed, and was consistent with the very terms and provisions of the agreement itself. And as to the second point, we agree entirely with the doctrine laid down in *Ryall v. Rolle* (1), that in the case of a

[*141] *simple pawn of a personal chattel, if the creditor parts with the possession he loses his property in the pledge: but we think the delivery of the chronometer to Wilson under the terms of the agreement itself was not a parting with the possession, but that the possession of Captain Wilson was still the possession of Messrs. Capper. The terms of the agreement were, that "they would allow him the use of it for the voyage:" words that gave him no interest in the chronometer, but only a licence or permission to use it, for a limited time, whilst he continued as their servant, and employed it for the purpose of navigating their ship. During the continuance of the voyage, and when the voyage terminated, the possession of Captain Wilson was the possession of Messrs. Capper; just as the possession of plate by a butler is the possession of the master:

(1) 1 Atk. 165.

and the delivery over to the plaintiff was, as between Captain Wilson and the defendants a wrongful act, just as the delivery over of the plate by the butler to a stranger would have been; and could give no more right to the bailee than Captain Wilson had himself. We therefore think the property belonged to the defendants, and that the rule must be made absolute for entering the verdict for the defendants.

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(5 Bing. N. C. 142—159; S. C. 6 Scott, 846.)

1838.
Nov. 26.

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Plaintiffs advanced 2,600*l.* to C. upon the security of an indenture of mortgage executed by C., and a promissory note for 2,600*l.*, in which defendant joined as a surety: at the time of the advance, C. owed plaintiffs 800*l.*, which was deducted from the 2,600*l.*, but the recital of the mortgage deed, which was read by plaintiffs' agent, in the presence of defendant, stated, untruly, that the 800*l.* had been paid: Held, that this was a fraud in law, which released defendant from his liability on the promissory note.

THE declaration contained two counts; the first on a promissory note, dated the 25th of November, 1831, whereby the defendant promised to pay to the plaintiffs and John Martin, since deceased, or order, on the 22nd of November, 1832, 2,600*l.*, with interest, and to pay the interest half-yearly. The second count was upon an account stated.

The defendant pleaded,

First, as to the first count, that he was induced to make the promissory note, and the same was obtained from him by the fraud, covin, and misrepresentation of the plaintiffs, and J. Martin, and others in collusion with him.

Secondly, to the first count, except as to 1,671*l.* 8*s.*, parcel of the moneys in that count mentioned, and the interest upon that sum, that before and at the time of the making of the note, certain persons, to wit, Leonard Streat Coxe and George Chambers, were desirous of borrowing of the plaintiffs and J. Martin a large sum, to wit, 2,600*l.*; and the plaintiffs and J. Martin proposed to lend the same upon certain securities being given them for the repayment thereof, with interest, and, amongst other securities, upon the security of the said note in the first count mentioned, to be therefore made and signed by the defendant, as surety of and for L. S. Coxe and G. Chambers in that behalf; and thereupon the

(1) Cited and distinguished by KAY, J. in *Mackreth v. Walmsley* (1884) 51 L. T. 19, 21.—B. C.

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said note was made by the defendant as surety of and for L. S. Coxe and G. Chambers, and as a security for the repayment of such sum, not exceeding 2,600*l.* as should be then, viz. at the time of the making the note and giving such other *securities, lent and advanced by the plaintiffs and J. Martin to L. S. Coxe and G. Chambers, with interest, and upon the terms and faith that the plaintiffs and J. Martin should and would, upon the note being made, and the securities being given and executed, advance and lend to L. S. Coxe and G. Chambers such sum of 2,600*l.*; and that the defendant should not be liable on the note except for such sum as the plaintiffs and J. Martin should then lend and advance to L. S. Coxe and G. Chambers on the said securities; and the defendant then made the said note upon the said terms, and not otherwise, or upon any other consideration. The defendant then averred that all the said securities, including the note, were then made, executed, and delivered to the plaintiffs and J. Martin, upon the terms aforesaid; and the plaintiffs and J. Martin then received the note upon the terms and considerations aforesaid; and that there never was any other consideration for making the note. That at the time and upon the making and executing and delivery to the plaintiffs and J. Martin of the said securities, including the note, they advanced and lent to L. S. Coxe and G. Chambers a much less sum of money than 2,600*l.*, to wit, 1,671*l.* 8*s.*, and no more, and forbore then to lend or advance to L. S. Coxe and G. Martin any further part of 2,600*l.* without the defendant's knowledge or consent; and that there never was any consideration for the payment of the note, or any part of the amount thereof, except as to the 1,671*l.* 8*s.*, with interest thereon; and the plaintiffs did not, at the time of the commencement of this action, hold the note for or upon any consideration except as to the 1,671*l.* 8*s.*, parcel, &c., and interest thereon.

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Thirdly, as to the first count, that the defendant made the promissory note in that count mentioned, as security for certain persons, to wit, L. S. Coxe and *G. Chambers, and in order to secure moneys to be paid by them to the plaintiffs and J. Martin; that after the death of J. Martin, and before the commencement of this suit, L. S. Coxe and G. Chambers paid and satisfied moneys to the amount of all moneys in the note mentioned, together with all interest due thereon; and that the plaintiffs received the same in full satisfaction and discharge of the cause of action in the first count mentioned.

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Fourthly, as to 932*l.* 11*s.* 3*d.*, parcel of the moneys in the first count mentioned, that before and at the time of the making the note in the declaration mentioned, L. S. Coxe and G. Chambers were co-partners in trade, and that the defendant made the promissory note as surety of and for L. S. Coxe and G. Chambers; and the plaintiffs and J. Martin, since deceased, then accepted and received the same as a collateral security for the repayment of a large sum, to wit, 2,600*l.*, to be lent and advanced by the plaintiffs and J. Martin, since deceased, to L. S. Coxe and G. Chambers, and not upon any other consideration; and the defendant made the note upon the terms that in case the plaintiffs and J. Martin, or any or either of them, should, by virtue of the deed hereinafter mentioned, sell the tenements and policies hereinafter mentioned, the defendant should be relieved from liability on the note to the extent of the moneys which, on such sale, should be received by them, or any or either of them, in satisfaction of the amount of the note, or any part thereof, so far as the same might extend and be applicable to the note: the defendant then averred that, before the making of the note, L. S. Coxe and G. Chambers had applied to and requested the plaintiffs and J. Martin, since deceased, to lend and advance to them, and the plaintiffs and J. Martin then agreed to lend them 2,600*l.* upon the security not only of the said note, but also upon the *security and on the terms and conditions mentioned and set forth in a certain indenture; (setting forth an indenture by which Coxe and Chambers mortgaged certain leaseholds and hereditaments, and assigned certain policies of insurance to the plaintiffs to secure the said sum of 2,600*l.*). That afterwards, to wit, on &c., default was made in payment of the 2,600*l.* mentioned in the indenture, and being the sum for securing which the note was given: and thereupon the plaintiffs according to their rights respectively in that behalf, afterwards, and after the death of J. Martin, and before the commencement of this suit, to wit, on &c., under and by virtue of the said indenture, and of the powers thereby given, sold and disposed of the said leaseholds and hereditaments, and the several instruments or policies of insurance, and other the premises mentioned in the indenture in that behalf, and being such securities as aforesaid, and which they were so authorised to sell respectively, at and for divers moneys, to wit, to the amount of 2,000*l.*; and that after deducting and retaining to and for themselves the plaintiffs respectively, all such several costs, charges, and expenses, and moneys as were in

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the first place to be deducted and retained, and could lawfully be deducted and retained by virtue of the indenture in that behalf, there then remained and was in the hands of the plaintiffs, and they then held and retained to their own use and benefit as the balance of 2,000*l.*, being the proceeds of the several securities, a large sum, to wit, 932*l.* 11*s.* 3*d.*, for and on account, and in satisfaction and discharge of the said 932*l.* 11*s.* 3*d.* parcel &c., and the cause of action in respect thereof, and such last-mentioned sum thereby then became and was satisfied and discharged; and the plaintiffs from thenceforth hitherto had held the said note without value or consideration as to the last-mentioned sum.

Fifthly, as to the last count, *non assumpsit*.

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The plaintiffs by their replication traversed the fraud in the first plea; replied *de injuriâ* to the second; traversed the payment in the third; the sale of the mortgaged property in the fourth,—averring that the plaintiffs did not sell or dispose of, or cause to be sold or disposed of, the hereditaments, instruments, or policies and premises in the indenture; and joined issue on the last.

A verdict was taken for the plaintiffs for 3,000*l.*, subject to the opinion of the COURT on a special case; which stated that:

The plaintiffs were bankers in London, and the defendant a general merchant residing in the same place.

For a considerable period, previously to the year 1825, Messrs. Coxe and Chambers, who carried on business in partnership, had a banking account with the predecessors of the plaintiffs in their banking firm, which banking account was continued with the plaintiffs, until the bankruptcy of Coxe and Chambers, as herein-after mentioned.

Mr. Coxe, one of the partners in the house of Coxe and Chambers, also kept with the plaintiffs a private and separate banking account for himself individually, which account was closed on the 24th of February, 1830.

In 1825, John Martin, since deceased, and the plaintiffs George Stone and Henry Stone, who then composed the banking firm, lent to Mr. Coxe, on his private account, the sum of 800*l.* as a specific loan on the security of an assignment of a policy on his own life, effected in the Equitable Assurance Company, for 1,500*l.* in 1809.

In the beginning of the year 1830, and before the 24th of February, the plaintiffs' firm allowed Mr. Coxe to receive from the Equitable Assurance Office the sum of 714*l.*, being the consideration for the sale of certain additions or accumulations upon the

before-mentioned policy of insurance, which would have become payable *at the death of Mr. Coxe, upon the understanding that he was thereout to pay to them the sum of 800*l.* in part discharge of the debt of 800*l.*, which he accordingly did, and which reduced his debt to 500*l.*

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Between April, 1825, and November, 1831, the plaintiff J. Martin, then J. Martin the younger, G. Stone the younger, and James Martin, had been partners in the bank; and on the 24th of June, 1830, the plaintiffs' firm lent to Mr. Coxe a further sum of 100*l.*, making, with the former balance of 500*l.*, 600*l.*, due on his own private account: the interest upon that loan was paid on or about Christmas in every year, up to Christmas, 1830.

In 1831, Messrs. Coxe and Chambers, having occasion for a loan on their partnership account, entered into a negotiation with the plaintiffs' firm, in order to obtain it. Pending that negotiation, and before any definite agreement between the plaintiffs' firm and Coxe and Chambers was come to, viz. on the 11th November, 1831, the plaintiffs' firm advanced to Coxe and Chambers 300*l.* as a specific loan, which loan was on that day carried to the credit of Coxe and Chambers in their general banking account.

On the 16th of the same month, it was agreed between the plaintiffs and Coxe and Chambers, through the medium of Coxe, but without the knowledge or privity of the defendant, who had not been applied to to become surety, that the plaintiffs' firm should make a loan to Coxe and Chambers of the sum of 2,600*l.*, and that the plaintiffs' firm should thereout deduct or be repaid the 600*l.* due from Mr. Coxe on his private account, and secured as before mentioned, and the interest thereon, amounting together to 62*l.* 10*s.* 8*d.*, and also the 300*l.* and interest advanced to Coxe and Chambers on the 11th of the same November; and that thereupon the policy of insurance for 1,500*l.*, which had *been given as a security for 800*l.*, should be transferred or stand as a security for the said sum of 2,600*l.*, which was to be further secured by an assignment to the plaintiffs' firm of certain leasehold premises, the property of Mr. Edward Chambers, the father of George Chambers, and of a certain policy effected in the Equitable Assurance Company for 500*l.*, on the life of the said G. Chambers; and also by a joint and several promissory note of some other persons who were to be afterwards named by Coxe and Chambers, and to be approved of by the plaintiffs; and subsequently, but before the 25th of the same November, the defendant and Edward

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Chambers were accordingly proposed as sureties, and were approved of by the plaintiffs.

An indenture by way of mortgage, bearing date the 25th November, 1831, was made between Edward Chambers, as therein described, of the first part; G. Chambers, of the second part; L. S. Coxe, of the third part; and the plaintiffs' firm, of the fourth part; and was executed by E. Chambers, G. Chambers, and L. S. Coxe, in conformity with the above agreement, the deed reciting, among other things, that the entire interest in the 1,500*l.* policy was available for the purposes of that security, the 800*l.* formerly borrowed on it by Coxe having been repaid to the plaintiffs, but not disclosing the arrangement made as to the application of the 2,600*l.*, or the deduction that was to be made from it in respect of previous debts. The deed was executed by the parties who signed it on the day it bore date, at the office of the solicitors for the plaintiffs' firm, and was read over in the presence of the defendant and Messrs. Coxe and Chambers.

At the same time the note upon which this action was brought was made and signed by the defendant and by E. Chambers, of which the following is a copy :

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“£2,600.

“LONDON, 25th Novr. 1831.

“On the 22nd day of November, 1832, we jointly and severally promise to pay Messrs. Martins and Stone, or order, two thousand six hundred pounds, with interest, and to pay the interest half yearly, for value received.”

On the back of the note the following memorandum was written, at the time it was made, and before it was executed, and read over to the defendant: “The within sum of 2,600*l.* is the same sum of money as is mentioned in an indenture dated the 25th November, 1831, and made between E. Chambers, of the first part; George Chambers, of the second part; L. S. Coxe, of the third part; and Messrs. Martin and Stone, of the fourth part.”

The defendant was surety in the note for Messrs. Coxe and Chambers, and became so at their request, made through G. Chambers, who communicated to him that the plaintiffs were to lend to the firm of Coxe and Chambers 2,600*l.*; but did not then, or at any other time, until long after the securities were executed, communicate the arrangement and agreement between the plaintiffs and Coxe and Chambers, or that there was any arrangement or agreement amongst the parties, further than

that the plaintiffs were simply to lend the sum of 2,600*l.* to Coxe and Chambers.

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Before the defendant signed the promissory note, the recitals of the deed were read over to him; but the plaintiffs did not, nor did their solicitor, nor did Coxe or Chambers, inform the defendant before he signed such note, that any agreement existed respecting the application of the sum of 2,600*l.*, or of the deduction to be made thereout; or that Coxe and Chambers, or either of them, were indebted to the plaintiffs: or that there had been any bonus received on the policy of *insurance. Nor did the defendant then or at any other time make any inquiries of the plaintiffs, or of their solicitor, or of Coxe and Chambers, as to the state of the accounts between the plaintiffs and Coxe and Chambers, or either of them, or as to the intended application of the loan, or as to any bonus having been received upon the policy of insurance.

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Coxe and Chambers had on the said 25th of November a small sum to their credit in their banking account with the plaintiffs, and they did not overdraw that sum until the 29th of November, when they drew various cheques, amounting together to a sum considerably more than the balance of their banking account; and on the same 29th of November, the plaintiffs' firm credited Coxe and Chambers in their general banking account, and in their pass-book, as follows: "Cr. 29th November, cash lent, 2,600*l.*—Dr. 1831. November 29th. By sundry loans and interest, 928*l.* 12*s.*; five days' interest allowed on 2,600*l.*, 1*l.* 8*s.* 6*d.*"

This sum of 928*l.* 12*s.* was the amount of the different loans above mentioned, and the interest due thereon; and the accounts were afterwards continued between the parties in the same pass-book and general account.

In January, 1832, John Martin died.

Coxe and Chambers paid the plaintiffs' firm the interest on the 2,600*l.* annually from the time of the advance till Christmas, 1834, the amount of such interest having been from time to time charged and allowed in the accounts between Coxe and Chambers and the plaintiffs, and stated in the usual pass-book.

In July, 1835, Coxe and Chambers stopped payment, and soon afterwards became bankrupts.

On or about the 28th of July in that year, the plaintiffs notified such stoppage to the defendant, and reminded him of his liability on his note.

After the bankruptcy of Coxe and Chambers, their assignees

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sold, by public auction, the two before-mentioned policies, which produced the sum of 871*l.*, viz. the policy for 500*l.* produced the sum of 86*l.*, and the policy for 1,500*l.* produced 835*l.*, which the plaintiffs received: the plaintiffs subsequently sold the leasehold premises which had been mortgaged to them, by private contract, for the sum of 270*l.*; and they also received a dividend under the bankruptcy of Coxe and Chambers on the debt of 2,600*l.*, of 364*l.* 7*s.* They gave the defendant notice of such intended sales, and also of the sums which were realised.

The sums still due to the plaintiffs on the note amounted to 1,300*l.* 10*s.* 7*d.* with interest, to recover which this action was brought.

The Court were to be at liberty to draw any inference which a jury might have drawn.

The question for the opinion of the Court was,

Whether the plaintiffs were entitled to recover any and what sum; and the verdict was to be entered on the separate issues for plaintiffs or defendant accordingly, or a nonsuit might be entered, as the Court should direct.

The case was argued by *Wilde*, Serjt. for the plaintiffs, and *Sir W. W. Follett*, for the defendant.

It will be convenient to begin with the argument for the defendant.

It was contended that if the situation of the surety be, by the act of the creditor, materially varied from what he was led to expect upon entering into the security, he is absolved from his engagement whether the altered circumstances occasion a detriment to him or not; for his engagement is entered into upon the representations made to him, and if in those representations*there be falsehood or concealment, a fraud in law has been committed which avoids the security.

In *Pidcock v. Bishop* (1), it was agreed between the vendors and vendee of goods that the latter should pay 10*s.* per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors. The payment of the goods was guaranteed by a third person, but the bargain between the parties was not communicated to the surety; and it was held that that was a fraud on the surety, and rendered the guaranty void. *BAYLEY, J.* said, "It is the duty of a party, taking a guaranty, to put the surety in possession of all the facts likely to affect the degree of his responsibility; and if he neglect to do so, it is at his peril."

(1) 27 R. R. 430 (3 B. & C. 605).

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“Where by a composition deed the creditors agree to take a certain sum in full discharge of their respective debts, a secret agreement, by which the debtor stipulates with one of the creditors to pay him a larger sum, is void, upon the ground that that agreement is a fraud upon the rest of the creditors. So that a contract which is a fraud upon a third person may, on that account, be void as between the parties to it. Here the contract to guarantee is void, because a fact materially affecting the nature of the obligation created by the contract was not communicated to the surety.” HOLROYD, J.: “The contract of the surety is not binding upon him, by reason of the plaintiffs not having communicated to the surety a secret bargain previously made by him with the vendee of the goods. The effect of that bargain was to divert a portion of the funds of the vendee from being applied to discharge the debt which he was about to contract with the plaintiffs, and to render the vendee less able to pay for the iron supplied to him.” “The plaintiff and defendant therefore were not on equal terms. The *former, with the knowledge of a fact which necessarily must have the effect of increasing the responsibility of the surety, without communicating the fact to him, suffers him to give the guaranty. That was a fraud upon the defendant, and vitiates the contract.” LITLEDALE, J.: “I think that a surety ought to be acquainted with the whole contract entered into with his principal.” *Jackson v. Duchaire* (1), *Mayhew v. Crickett* (2), and *Glyn v. Hertel* (3), proceeded on the same principle. See Harrison’s Index, 885. Here, the defendant was led to suppose that the whole of the 2,600*l.* would be applied to the use of the firm of Coxe and Chambers; he was not apprised of the deduction of 900*l.* for a previous debt: to that extent, and at all events to the extent of the 600*l.* (part of the 900*l.*) which was deducted for the private debt of Coxe, the firm was less able to meet the demands of their creditors than the surety had reason to expect. He was also deceived as to the value of the 1,500*l.* policy assigned to the plaintiffs as a collateral security. The deed of November, 1835, reciting that the 800*l.* lent to Coxe on the security of that policy had been repaid, the surety was led to suppose that the entire policy, with all its accumulations, would be available to the plaintiffs in reduction of any demand against the surety: whereas the plaintiffs held the policy *minus* the bonus of 714*l.* which had been paid to Coxe.

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(1) 3 T. R. 551.

(3) 8 Taunt. 208.

(2) 19 R. R. 57 (2 Swanst. 193).

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The defendant, therefore, having been kept in ignorance as to the real amount of the loan to Coxe and Chambers, and having been misled as to the value of the security in the plaintiffs' hands, there was fraud in law sufficient to establish the first plea, and avoid the promissory note.

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For the plaintiffs it was argued, that the question upon this record was, not as to the incidents of a *guaranty, but whether the defendant had been induced to give a promissory note by fraud, and whether there was a failure of consideration. It was not necessary for the plaintiffs to contest the principle contended for on the part of the defendant in respect of guaranties: for it is true, that where a party enters into a special guaranty, the limitations attached to such an instrument must be attended to; but where he becomes surety by a promissory note, he is generally liable if there be no fraud or failure of consideration: the form of the instrument is a substantial part of the contract: there must be *bona fides*, but no communication of the circumstances attending the transaction is necessary, as in the case of a guaranty or policy of insurance, where the underwriter has no means of obtaining a knowledge of the risk except what he is told by the assured: thus, in *Nichols v. Norris* (1); the defendant gave a promissory note, payable to R. Johnston—for which the defendant had received no consideration—as a security for goods to be sold to Johnston on credit; and Johnston indorsed the note over to the creditors. Johnston afterwards executed a deed of composition with the creditors, by which he undertook to pay his debt to them by instalments, and it was stipulated that they should not be prevented by that arrangement from suing on any securities which they held, and that on any default of paying the instalments, the deed should be void: it was held, that the delay granted to Johnston by that agreement did not discharge the defendant. And Lord TENTERDEN said, “Deeds of this kind are very common, and it is very usual to insert clauses like the present, reserving the remedy against sureties. If we were to hold that, notwithstanding such a proviso, the liability of a person in the situation of this defendant was gone, *it might prevent such deeds from being entered into, which would often be against the interests of all parties. In other respects I think there is no material difference between this case and *Fentum v. Pocock*.” The same

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(1) 3 B. & Ad. 41, n.

principle was acted on in *Price v. Edmunds* (1), *Bank of Ireland v. Beresford* (2), and *Free v. Hawkins* (3). *Glyn v. Hertel* only decided that the exchange of one promissory note for another is not a new advance of money. Then, here, there was no fraud either in fact or in law; for it was not necessary to communicate to the defendant the manner in which the 2,600*l.* was distributed among the borrowers, and it did not lessen their solvency that a portion of the sum was applied to the discharge of a debt due to the lender: eventually that debt must have been discharged, and it was immaterial whether out of the 2,600*l.*, or from any other source. As to the policy of insurance, the defendant being no party to the deed, could not take advantage of any misrecital: the deed was only read in his presence to show the form in which the loan was to be effected: but it would occasion interminable embarrassment in the commercial world, if upon every advance of money upon the security of a promissory note, the maker should be allowed to enter into collateral transactions, and traverse the allegations in a deed in which he had no concern. The effect of the defendant's objection would be to write into a note which creates a general liability, limitations and restrictions which were never intended by the parties.

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Cur. adv. vult.

TINDAL, Ch. J. :

The main question in this case, and which arises upon the first plea to the count upon the *promissory note, is this, whether the promissory note was obtained from the defendant under circumstances which are deemed in law to amount to covin (for there is no suggestion whatever of any intentional fraud or misrepresentation on the part of the plaintiffs personally), so as thereby to avoid the validity of the security in the hands of the plaintiffs.

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The promissory note having been given by the defendant as a security for the debt of Messrs. Coxe and Chambers, and the note still remaining in the hands of the plaintiffs, the original payees, the consideration upon which it was given to them, and the several circumstances under which the defendant was induced to enter into it, are the subject of inquiry and investigation in the present action. And with respect to the nature of such inquiry, and its bearing and effect on the validity of the instrument, we cannot see any sound legal distinction arising from the form of the security

(1) 10 B. & C. 578.

(3) 8 Taunt. 92.

(2) 6 Dowl. P. C. 237.

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itself, that is, whether such security is taken in the form of a promissory note, or as an ordinary guaranty for the payment of the debt of a third person. For the liability of the maker of the note, and of the guarantor, depends precisely on the same event, namely, the default of the principal debtor to make good his payment; and the extent of the surety's liability is precisely the same on either instrument; so that there seems no reason, and no authority has been cited to the effect, that the validity of the two instruments should not stand upon precisely the same footing, so far as depends on the circumstances under which the same were given.

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Now the principle to be drawn from the cases to which reference has been made in the course of argument we take to be this; that if, with the knowledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented *to the surety, the misrepresentation being such, that but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the security so given is void at law, on the ground of fraud.

The question therefore becomes this, whether, upon the facts stated in the special case, there appears to have been any such misrepresentation on the part of the plaintiffs?

It is perfectly true, as urged by the counsel for the plaintiffs, that the agreement between the plaintiffs and Coxe and Chambers, under which the former were to be allowed to deduct out of the advance of the 2,600*l.* the old debt of 800*l.*, due from Coxe on his separate account, was entered into before any application had been made to the defendant to become surety; and also that Coxe and Chambers never communicated to the defendant until long after the transaction that any such arrangement had been made, or indeed any other, than that the plaintiffs were simply to lend them 2,600*l.*: and if the matter had rested here, no objection, either on the ground of suppression or misrepresentation, could have been urged against the validity of the note. The plaintiffs were not to be made responsible for the communication, or want of communication, between their debtor and the surety, unless they are shown to be agreeing to it; and for anything which appears, as to this part of the transaction, they were ignorant that a correct statement had not been made to the defendant. But it appears from the special case, that, at the time of signing the

note, the principal debtors, Coxe and Chambers, and the defendant were at the office of the plaintiffs' attorney, where the deed of the 25th of November was read over in their presence: the case stating expressly, "that before the defendant signed the promissory *note, the recitals of the deed were read over to him;" and that upon the same occasion, and before the note was signed by the defendant, the memorandum was indorsed upon the note, stating that the sum mentioned in it was the same sum as that mentioned in the deed. Now we think the construction, and the only construction, which can be put upon the recitals in the deed is, that the former debt of 800*l.* due to the plaintiffs from Coxe, on his separate account, and the repayment of which was secured by Coxe's policy for 1,500*l.*, had been, at that time, paid by Coxe to the plaintiffs; and that the sum agreed to be advanced by the plaintiffs to Coxe and Chambers upon a new loan, was the full and entire sum of 2,600*l.* We cannot consider these recitals in any other light than as a direct representation made to the defendant before the note was signed, not indeed personally by themselves, but by the agents of the plaintiffs employed in carrying the negotiation for the loan into effect, and consequently by whose acts the plaintiffs are bound; and that this representation was untrue in a material respect, namely, that the private debt of Coxe had not been paid at the time of the execution of the deed; and that the entire sum of 2,600*l.* was, by the private stipulation between the parties, not to be advanced to, or placed to the credit of, Coxe and Chambers, but only the sum of 2,600*l.* *minus* the amount of the debt due from Coxe to the plaintiffs.

And we think ourselves bound, upon every legal principle of reasoning, to assume, that as the defendant was present when the recitals of the deed were read over to him, he must have signed the note with a full knowledge and understanding of the facts therein stated, and in the faith and confidence that the statement was true. The recitals were read over to him for the purpose of making him acquainted with the state of the *account between Coxe and Chambers and the plaintiffs, and with the collateral securities given by Coxe and Chambers, which he, the surety, might, if it became necessary, call to his aid and indemnity; and his attention must have been called to the recitals in the deed by the circumstance of the memorandum indorsed on the note, which could be placed there for no other purpose than to connect the note with the transaction stated in the deed.

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Then, as it appears to us that the representation as to the repayment of the debt due from Coxe, and the amount of the new loan to Coxe and Chambers, was untrue, and that such misrepresentation related to a fact material to the surety's interest, we think the promissory note is thereby void. And such being our opinion on this point, it becomes unnecessary to discuss the second objection which has been urged, as to the misrepresentation in the recitals of the deed, of the then existing state and value of Coxe's policy; on which point, however, if it had been necessary, we should have been ready to declare our opinion.

We think, therefore, a nonsuit should be entered.

Judgment of nonsuit.

1839.
Jan. 11.

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OF WILKINS (1).

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(5 Bing. N. C. 187—192; S. C. 7 Scott, 106; 8 L. J. (N. S.) C. P. 89; 7 Dowl. P. C. 299; 3 Jur. 149.)

An arbitrator, with a view of enabling one of the parties litigant to make an application to this Court, after the publication of his award, stated matters which showed he had put a mistaken construction on the rule of reference, and had misdecided accordingly: the Court received affidavits of these facts, and set aside the award, notwithstanding on the face of it there was no objection.

THIS was an action of assumpsit against the defendants, as executors of Wilkins, for the amount of a mason's bill, in respect of work done to the testator's house in the time of the testator. Another action was brought by the same plaintiff against the same defendants, in their own capacity, for mason's work done to the same house after the death of the testator. The former action came on for trial at the Brecon Spring Assizes, 1838, when, by an order of Nisi Prius, a verdict *was entered for the plaintiff for the damages in the declaration, subject to the award of a barrister, to whom that cause and also the other, and all matters in difference between the parties and the heir of the testator (who became a party to the reference), were referred. The arbitrator, by his award, directed that the verdict in the first action should stand for 295*l.*; and as to the second action, that the plaintiff had no

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(1) Cited and followed by BLACKBURN, J. in *Buccleuch (Duke of) v. Metrop. Board of Works* (Ex. Ch. 1870) L. R. 5 Ex. 221, 232. The judgment of the Exchequer Chamber in that case

was reversed by the House of Lords (1872) L. R. 5 H. L. 418; but not on the point for which the above case was cited as an authority.—R. C.

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cause of action, and that it should be discontinued. And as to the matters in difference between the plaintiff and the defendants and the heir, that the plaintiff had no further demand or claim upon the defendants or the heir; and he directed, that the defendants and the heir should pay the costs of the reference and the award in equal moieties.

Wilde, Serjt. obtained a rule *nisi* to set aside this award upon affidavits, stating, that upon the reference it was admitted by the plaintiff's attorney, that the second action could not be supported; and, further, that some parts of the work were done after the testator's death, though the plaintiff could not distinguish what parts; but that it had been contended, on behalf of the plaintiff, that under the terms of the rule of reference the arbitrator was authorised to consider all the claims of the plaintiff, on the heir as well as the executors, and to direct the verdict to stand for the whole conjoint amount; while, on behalf of the defendants and the heir, it was contended that such a construction of the order of reference could not be allowed, as the defendants in the capacity of executors could not be chargeable for repairs done in the time of the heir. That after the award was made, a clerk of the defendant's attorney, who had the management of the cause, applied to the arbitrator, previously telling him that the object of the application was to enable *the defendants to appeal to the Court upon the construction of the order of reference, and requested the arbitrator to inform him in what mode he had decided on the question of the construction of the order; and that the arbitrator, for the purpose of enabling the defendants to make an application to the Court, stated that the construction he had placed on the order was, that if any thing was due to the plaintiff either from the defendants or the heir, whether such debt were the subject of the first action or not, the verdict in that action was to stand for the whole amount. And that he had acted on that principle in making his award.

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E. V. Williams, who showed cause, contended, that as the award was good on the face of it as compared with the terms of the submission and the matters submitted, it could not be disturbed. As to what took place on the reference, the Court could not set aside the award with regard to any such matter: that it would be dangerous to act on any such ground, not only because the arguments and points taken before the arbitrator were liable to be misrepresented, but because possibly the arbitrator might have

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disregarded them, and have proceeded on some ground not suggested by either party. In the present case he might have thought, that as the works were begun on a contract made by the testator, his executors were solely liable for the completion of them under such contract; or he might have considered, that any payments made on account, were appropriated to the later items, and not to the works done in the testator's lifetime. If he proceeded on any such ground, though it might not be clear that he was right, yet the Court had no power on that account to set aside his award; for the Court could not interfere on the mere ground that the arbitrator had mistaken the *law: *Campbell v. Twemlow* (1), *Symes v. Goodfellow* (2). As to the conversation with the arbitrator after the making of the award, the Court could not look to that to ascertain the grounds on which the arbitrator proceeded; for an award cannot be set aside except for some defect appearing on the face of it, or of some paper delivered with it, so as to form a part of it. In *Williams v. Jones* (3), the arbitrator wrote a letter explaining the grounds on which he had made his award; but the Court refused to look at it for the purpose of setting aside the award. Again, the plaintiff could not answer the affidavit as to the conversation with the arbitrator, unless he went to the arbitrator and requested him to make an affidavit; and it would be unseemly, if arbitrators were to be subjected to the necessity of making affidavits.

(TINDAL, Ch. J.: You might have asked him if it was true that he had said what is imputed, and if he denied it, you might have made an affidavit of his denial.)

That would have been to ask the Court to disbelieve a positive oath, on an affidavit of a statement made by a party not upon oath. It has been held, however, that the affidavit of an arbitrator is not receivable to explain his award: *Gordon v. Mitchell* (4). So, the declarations or affidavits of jurymen are not receivable for the purpose of showing that they have acted on improper or mistaken grounds in giving their verdict. That principle applies to the case of the declarations of an arbitrator as to the grounds on which he has acted, because he stands in the position, by the consent of the parties, of both Judge and jury.

(1) 1 Price, 81.

(2) 2 Bing. N. C. 532.

(3) 5 Man. & Ry. 3.

(4) 21 R. R. 728 (3 Moore, 241).

TINDAL, Ch. J. :

I think this award must be set aside. It appears that an action has been brought against the *defendants in their own right, and another action against them in their capacity of executors, for work done by the plaintiff as a mason in the time of the testator and after his decease; and that these actions were referred to arbitration, with liberty to the heir-at-law to come in as a party to such arbitration. The arbitrator finds that there was no ground for the action against the defendants in their own right, and has ordered a discontinuance: the work was done to the testator's house, partly in the time of the testator, and partly in the time of the heir; and the arbitrator, combining the two sums, gives the plaintiff the benefit of a judgment for the whole against the defendants, calling on them therefore to pay what is due from the heir. In a conversation with the defendant's attorney, he states that such was the ground of his award; and it is objected that we ought not to receive evidence of that conversation after the proceedings were finished, to impeach the award; and in ordinary cases I agree that we ought not; but here, when the arbitrator, upon being told that an application is about to be made to the Court, himself assigns the ground of his judgment, for the purpose of enabling the defendant to make such application, and shows that he is mistaken, it is immaterial whether he gives this out in the course of the proceedings or after the award.

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VAUGHAN, J. :

We are slow to interfere against an award; but it is an exception to the general rule, where the arbitrator, upon being told his judgment will be reviewed, and in furtherance of an appeal, assigns an erroneous ground for the decision he pronounces.

BOSANQUET, J. :

This is, in effect, a mistake made by the arbitrator as to the extent of his jurisdiction in the action against the defendants: and, under the present *circumstances, the Court is authorised to hear what the arbitrator has said as to the principles on which he considered his jurisdiction to be founded.

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ERSKINE, J. :

I am of the same opinion. The arbitrator having been told that an application would be made to the Court, he must be taken to

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have expressed himself with a view to the opinion of the Court. The Court, however, would not have interposed unless it had appeared that the arbitrator had mistaken his powers, as he clearly has done in awarding that the defendants shall pay as well for the work done in the time of the heir as for that done in the time of the testator.

Rule absolute.

1839.
Jan. 14.
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DALTON v. GIB (1).

(5 Bing. N. C. 198—200; S. C. 7 Scott, 117; 1 Arn. 463; 8 L. J. (N. S.) C. P. 157; 3 Jur. 43.)

Defendant, an infant, living in a style of some pretension, having purchased of plaintiff, in the course of four months, silks to the amount of 35*l.*, some of which were delivered in the presence of her mother, and some sent to a fashionable hotel, where defendant and her mother lived: Held, that defendant was liable for the amount, notwithstanding plaintiff had omitted to make any enquiries of the mother whether or not the articles were necessary for the defendant.

THE defendant pleaded infancy to an action for goods sold and delivered, and upon a replication that the goods were necessaries according to her station in life, it appeared,

That the defendant, a young woman of twenty, was at the time of the delivery of the goods in question, living with her mother at a hotel in Hanover Square; that the mother and daughter drove about in a carriage; that the mother was sitting in the carriage when the defendant stepped out into the plaintiff's shop, and purchased some of the goods in question; and that the residue of them had been sent to the hotel in Hanover Square.

The articles, which were chiefly silks, amounted to 35*l.*, and been supplied in the course of four months.

The plaintiff had never made any enquiries of the mother, and it appeared that, notwithstanding the figure she cut, she was in embarrassed circumstances, her husband living in Calais, and herself being unable to pay her servants' wages.

The defendant told the plaintiff that she had expectations from her grandfather.

THE CHIEF JUSTICE directed the jury, that in forming their opinion whether or not the goods in question were necessaries, they must look to the apparent station and circumstances of the

(1) No judicial comment on this case has been found, but it seems that, according to the later authorities confirmed by s. 2 of the Sale of Goods

Act, 1893, neither the direction to the jury nor the reasoning of the Court can be supported. See the Preface.—F. P.

party. A verdict having been found for 25*l.* 16*s.* the balance claimed,

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Hayes moved for a new trial, on the ground that the verdict was against the weight of evidence; and also that the jury should have been told to look to the actual, *not the apparent situation of the defendant. As the daughter was living with her mother, it was to be presumed she was supplied with necessaries at home, and if the plaintiff had enquired of the parent as he ought to have done: *Ford v. Fothergill* (1), *Bainbridge v. Pickering* (2), *Story v. Pery* (3), *Cook v. Denton* (4), he might have ascertained what the real circumstances of the defendant were. In *Brayshaw v. Eaton* (5), where an attorney's clerk in London, who had been supplied with proper clothes by his mother at Newcastle, was sued for the price of a Newmarket coat and other incongruous attire, this Court, in the present Term, granted a rule *nisi* to set aside a verdict for the plaintiff.

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TINDAL, Ch. J. :

In that case the objection was, that the infant was supplied with necessaries from another quarter, as the plaintiff might have ascertained upon enquiry. On the present occasion I do not mean to break in on the rule as to the propriety of making enquiry: but a party, by her conduct, may give such an appearance to things as to render enquiry unnecessary.

Here, the infant, living with her mother at a hotel at the west end of the town, drives to the plaintiff's shop in a carriage, accompanied by her mother, who waits in the carriage while the daughter purchases the goods: some she took home in the carriage; others were delivered at the hotel: under these circumstances the jury might fairly infer that the whole had come under the mother's inspection, and if so, what necessity was there for making enquiry about that which the mother had sanctioned. In addition to this, the daughter said she had expectations from her grandfather, and the whole *conduct of the parties was such as to render enquiry unnecessary.

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VAUGHAN, J. :

I am of the same opinion. The presence of the mother when

(1) 3 B. R. 695 (1 Peake, 301; 1 Esp. 211).

(2) 2 W. Bl. 1325.

(3) 4 Car. & P. 526.

(4) 33 B. R. 656 (3 Car. & P. 114).

(5) *Post* (in banc), p. 671.

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the daughter purchased the articles, and her omission to reject those which were delivered at the hotel, rendered enquiry superfluous.

BOSANQUET, J. :

Generally speaking, it is necessary that the tradesman should make enquiry; but here the parent came to the shop with a daughter twenty years of age, and it was not necessary that the shopman should ask her whether she sanctioned by her words what she sanctioned by her conduct.

ERSKINE, J. :

In *Brayshaw v. Eaton* the defendant was living apart from his friends, and enquiry might have satisfied the tradesman that he was sufficiently supplied with clothes.

Here, the countenance given by the mother to her daughter's purchase, rendered enquiry superfluous.

Rule refused.

1839.
Jan. 25.
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SMITH v. NICOLLS (1).

(5 Bing. N. C. 208—224; S. C. 7 Scott, 147; 1 Arn. 474; 8 L. J. (N. S.) C. P. 92; 7 Dowl. P. C. 282.)

To an action of trover defendant pleaded, that defendant being within the jurisdiction of the Admiralty Court of Sierra Leone, plaintiff recovered a judgment against him in that Court for the same cause of action: Held, ill.

CASE. The declaration contained six counts: the first count was for an unfounded charge of illegal trading and seizure of the plaintiff's ship, the *Admiral Owen*; 2, for maliciously arresting the plaintiff for an alleged rescue of the *Admiral Owen*, and obliging him to enter into recognizances in the sum of 2,000*l.*, to appear to the charge within six calendar months then following; 3, for falsely charging the plaintiff with having feloniously received Government stores, alleged to have been feloniously stolen, the plaintiff knowing the same to have been so stolen, and causing him to be imprisoned for a long time; 4, for falsely charging the plaintiff with having received goods, knowing them to have been stolen, and causing his house and premises to be entered and searched for them; 5, for not selling the plaintiff's goods with due care; and the sixth was a count in trover.

(1) Cited by KENNEDY, J. in *In re King and Beesley* [1895] 1 Q. B. 189, 193; 64 L. J. Q. B. 126, 128. And see *Bank of Australasia v. Harding* (1830) 9 C. B. 661, 19 L. J. C. P. 345.—R. C.

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To these counts the defendant pleaded, 1, not guilty; 2, the Statute of Limitations; 3, to the fifth count, that defendant had not the sale or disposal of the goods; 4, to the last count, that the goods were not the goods, &c. of the plaintiff; and, 5th, to part of the last count, that before and at and during the times in the last count mentioned, the defendant was a public officer of our Lord the King, to wit, governor and superintendent of a certain island, then parcel of his Majesty's possessions in parts beyond the seas, called Fernando Po, and one of the justices assigned to keep the peace of our Lord the King in and for the said island, the said island then being within the jurisdiction of the Court of Vice-Admiralty, of and for and held *within his Majesty's colony of Sierra Leone: that he being such public officer and justice as aforesaid, and believing that a breach of the navigation laws had been committed by the plaintiff with the said ship and boat within the said jurisdiction, and that the said ship and boat, and the goods on board of the ship were liable to forfeiture, and that it was his duty, as such public officer and justice, to cause the said ship and boat, with the goods then on board thereof, to be conveyed to Sierra Leone for adjudication in the said Court, did, to wit, on, &c., within the said jurisdiction, cause the said ship and boat, and the goods then on board of the ship to be, and the same ship, boat, and goods, thereupon were seized by the crew of a certain ship employed in his Majesty's service in that behalf; and thereupon then and there caused the same ship, boat, and goods, to be, and the same thereupon then were conveyed to Sierra Leone aforesaid, for adjudication in the said Court, on the matters there to be alleged in respect of such breach of the said laws; and, thereupon, then caused the same ship, boat, and goods to be, and the same then were detained at Sierra Leone for a certain space of time, to wit, for the space of three weeks; at the expiration whereof, to wit, on, &c., the said ship, boat, and goods were restored to and received back by the plaintiff, he then being discharged and acquitted of the said breach of navigation law: that in so causing the ship, boat, and goods to be seized, conveyed, and detained as aforesaid and not otherwise, he converted and disposed thereof in manner and form as the plaintiff had above in that behalf complained against him: that before the commencement of this suit, to wit, on &c., the plaintiff impleaded the defendant in the said Court of Vice-Admiralty, the same Court then and thenceforth continually having jurisdiction in the premises, of and concerning the causing the said ship, boat,

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and goods to be seized, conveyed, *and detained, as aforesaid, and for all the damages by the plaintiff sustained on occasion thereof; and the plaintiff then claimed and sued for such damages in such plea in the said Court as aforesaid; and such proceedings were thereupon had in the said Court, that afterwards and before the commencement of this suit, to wit, on &c., a sentence and decree were made and pronounced in and by the Court in the said plea, and in and upon the matters of the said claim and suit; and by that sentence and decree it was ordered and adjudged, that the defendant should pay to the plaintiff the damages by the plaintiff sustained on occasion of the premises, with costs and expenses, the amount of such costs, damages, and expenses to be ascertained and reported to the said Court by the registrar thereof: and, thereupon, afterwards and before the commencement of this suit, to wit, on &c., the registrar of the Court, to wit, one John Samo, did ascertain and report to the Court that such costs, damages, and expenses, amounted to a certain sum of money, to wit, 450*l.* 5*s.*; and which report was afterwards and before the commencement of this suit, to wit, on &c., read and affirmed by the said Court: which sentence, decree, and affirmance, have not been in anywise reversed or made void: and that, the defendant was ready to verify.

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Seventhly, that before and at and during the times in the same count mentioned, the defendant was a public officer, to wit, governor &c. of Fernando Po &c., and one of the justices &c.: that at the said times when &c., the said goods were in and upon the said island; and that before any of the said times when &c., to wit, on &c., the plaintiff left the island, and from thenceforth continually, until and during and at and after the said times when &c., remained and was absent from the said island; and that during all the said times when &c., there was no one on the part of the plaintiff in *charge of the same goods, and the same were, by reason thereof, in danger of being lost, or stolen; whereupon the defendant, then being such public officer and justice as aforesaid, and believing that it was his duty as such public officer and justice, so far as in him lay, to protect and take care of property in the island left unprotected, and to dispose of the same in the way most consistent with the interests of the owners thereof, and that it was for the interest, and would prove consistent with the wishes of the plaintiff, that the said goods should be disposed of as hereinafter mentioned, and for the purpose of preventing the plaintiff from being deprived of and losing the same goods, and in order to procure for and

preserve to the plaintiff all the benefit and advantage that could be derived therefrom, did, to wit, on &c., cause the same to be, and the same thereupon then were taken and collected by and into the hands of certain public officers of the island, by the defendant in that behalf directed and authorised; and thereupon the said goods then were sold and disposed of for the most money that could be reasonably gotten for the same; which, after deducting certain expenses and necessary payments thereout, then amounted to a certain large sum of money, to wit, 5,000*l.*; and thereupon the defendant then caused the same sum to be, and the same then was remitted to certain other persons, to wit, the Lords Commissioners of his Majesty's Treasury, for the purpose of being paid over to and received by the plaintiff in full satisfaction and discharge of the cause of action in the last count mentioned, and all damages by the plaintiff sustained on occasion thereof. That afterwards, and before the commencement of this suit, to wit, on &c., the plaintiff accepted and received the same sum of money from the same persons in full satisfaction and discharge of the cause of action in that count mentioned, and all damages *by him sustained on occasion thereof. That, in so causing the said goods to be collected and taken, and disposed of and dealt with as aforesaid, and not otherwise, he converted and disposed of them in manner and form as the plaintiff had above in that behalf complained against him; and that, the defendant was ready to verify.

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The plaintiff replied to the fifth plea, that the defendant was not in the colony of Sierra Leone, or at any place within the jurisdiction of the Vice-Admiralty Court, before or at the time of the commencement of or at any time during the proceedings in the said Court in the matter of the said claim and suit in the said Vice-Admiralty Court in that plea mentioned; nor was the defendant, at any time before the making or pronouncing of the said sentence and decree in the plea mentioned, or the making or affirming of the report therein mentioned, in any manner according to the course and practice of the said Court in the said matter, or in anywise, notified, nor did the defendant then know of the same proceedings, or any of them, so that the defendant could or might by himself or his proctor, attorney, or other agent by him appointed and instructed in that behalf, appear or plead, or in anywise defend himself in the matter of the said claim and suit; nor did the defendant appear in or to any or either of the said proceedings; whereby the said sentence and decree, and affirmance, were and are contrary to

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natural justice, and wholly inoperative and void; and all remedy thereon for the recovery of the damages and costs, and expenses, for which the sentence and decree and affirmance were made and given, was and is lost to the plaintiff; and the defendant always resisted and impeached the said sentence and decree and affirmance on that account, and the same continued so inoperative and void; and the plaintiff had not ever obtained, or been *able to obtain, the said damages and costs and expenses, or either of them, or any part thereof in the plea stated to have been adjudged to him; and the said sentence and decree and affirmance still remained so unsatisfied, and without force or effect: and that, the plaintiff was ready to verify.

To the last plea the plaintiff replied, that at the said times when &c. in the last count mentioned, divers persons and servants of the plaintiff had the charge of the said goods for the plaintiff, and on his behalf; and the same were not, nor was any part thereof in danger of being lost or stolen; and the defendant well knowing the same, wrongfully caused the said goods to be taken and sold and disposed of, otherwise than for the purpose of preventing the plaintiff from being deprived of or losing the same, or in order to procure for and preserve to the plaintiff the benefit and advantage that could be derived therefrom: that the plaintiff did not accept or receive the said sum of 5,000*l.* in full satisfaction and discharge of the cause of action, and all damages sustained on occasion thereof: and that, the plaintiff prayed might be enquired of by the country.

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In rejoinder, the defendant demurred to the replication to the fifth plea,—on the ground that the plaintiff was estopped from asserting against the defendant the nullity of the judgment admittedly obtained by him against the defendant: that the judgment not being shown to have been in any way reversed or made void, was a subsisting bar to an action for the same cause of action: that the replication did not sufficiently show that the judgment was void, or that it had been deprived of efficacy: and that the subsistence and validity of the said judgment, in law, were consistent with the truth of all the matters disclosed in the replication: that the replication was too general, and did not sufficiently show how, as alleged, all remedy on the *judgment was lost to the plaintiff, or how, as alleged, the defendant had impeached the judgment: that the replication was double and multifarious, and attempted to set up various distinct matters by way of reply, that is to say, that the judgment was void; that all remedy thereon had been lost; that the

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defendant had impeached it; and that the plaintiff had derived no benefit from it: that the replication contained irrelevant and superfluous matter, and that no single and sufficient issue could be taken thereon: that it traversed mere matter of inducement and took immaterial issues: that it raised a negative pregnant, by denying the judgment concerning the causes of action stated, leaving it doubtful whether the judgment or the identity of the causes of action was denied, or both: that it departed from the count, which was in trover, by showing the cause of action to be in trespass: And

To the replication to the seventh plea,—on the ground, that it traversed mere matter of inducement, and raised immaterial issues; that it was double and multifarious; and that it departed from the count which was in trover, by stating in support thereof matters which showed the cause of action to be trespass.

Henderson, in support of the demurrer:

If the fifth plea be good, the replication affords no answer to it; and the plea is good, because *prima facie* the judgment of the Colonial Court is entitled to credit, and at all events voidable only and not void. The plaintiff in his replication has not denied the general jurisdiction of the Court, and the absence of the defendant does not render its proceedings null. If an officer of that Court had seized in execution property of the defendant's at Sierra Leone, the officer would not have been liable in trespass or trover. *Ladbroke v. Crickett* (1). *And the defendant's absence did not render the proceedings void; if it did, no judgment of outlawry could ever be enforced. At all events the plaintiff is estopped to raise the objection, for he was the actor, and procured the judgment which he now alleges to be null. The question is, in effect, a question as to the validity of the practice of the Court of Sierra Leone; and according to *Tarleton v. Tarleton* (2), the Courts at Westminster are not courts of error for tribunals in the colonies. But it was held in *Becquet v. M'Carthy* (3), that in order to treat a foreign judgment as void on the ground that it is contrary to the law of the country where it was pronounced, it must be shown to be void, clearly and unequivocally; and where the law of a British colony required, that in a suit instituted against an absent party, the process should be served upon the King's Attorney-General in the colony, but it was

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(1) 1 R. R. 571 (2 T. R. 649).

(3) 36 R. R. 803 (2 B. & Ad. 951).

(2) 4 M. & S. 20.

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not expressly provided that the Attorney-General should communicate with the absent party, it was held, that such law was not so contrary to natural justice, as to render void a judgment obtained against a party who had resided within the jurisdiction of the Court at the time when the cause of action accrued, but had withdrawn himself before the proceedings were commenced. So, in *Martin v. Nicolls* (1), it was held that the grounds of a foreign judgment cannot be reviewed in the Courts of this country: and in *Douglas v. Forrest* (2), that an action was maintainable in the English Courts on a Scotch judgment of Horning, obtained against a Scotchman who was absent and had no notice of the proceedings. This, too, was a matter in which the Court of Admiralty had exclusive jurisdiction, and therefore it cannot form the subject of an action here: *Le Caux v. Eden* (3). In *Burrows v. Jemino* (4) it was expressly decided that a party cannot be sued here on his acceptance of a bill of exchange abroad, after he has been discharged by a judgment of the country where the bill was accepted. In *Buchanan v. Rucker* (5), and *Cavan v. Stewart* (6), which may be cited for the plaintiff, it did not appear that the defendant had ever been resident within the jurisdiction of the Colonial Court.

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(*W. H. Watson* for the plaintiff: The replication here alleges that the defendant never was within the jurisdiction; but if the fact were otherwise, the plaintiff consents to an amendment.

TINDAL, Ch. J.: I think the plea is bad independently of that.)

Then, the replication to the seventh plea is double, taking issue on matter of inducement, as well as on the allegation of satisfaction. It is also a departure from the declaration in trover, because it discloses the grounds of action of trespass.

W. H. Watson, contra:

The fifth plea is ill. There is no authority which decides that a mere judgment in a foreign Court, not followed by execution, is a bar to an action here. There is no analogy between a judgment in courts of record here, and a judgment in a colonial Court. Judgments here, are binding as to the merits, the jurisdiction, and the parties: they can only be questioned by a court of error: they are final and

(1) 3 Sim. 458.

(2) 29 R. R. 695 (4 Bing. 686).

(3) Dougl. 594.

(4) 2 Str. 733.

(5) 9 R. R. 531 (9 East, 192; 1 Camp. 63).

(6) 1 Stark. 525.

conclusive by way of estoppel, and in the administration of assets rank before simple contracts and specialty debts: but the judgment of a colonial Court is no more than a simple contract; an accord as to the *quantum* due, without satisfaction: it ranks with simple contracts in the administration of assets; and may be questioned in the Courts of this country: 1 Phill. Evid. 537; if the defendant *has not been properly summoned, the judgment is a nullity: *Buchanan v. Rucker*. In *Hall v. Odber* (1) Lord ELLENBOROUGH said, "Judgments in foreign Courts are not to be considered upon the same footing as judgments in our own courts of record; they are but evidence of the debt; they do not bar or stay an action on simple contract; but assumpsit lies on them, and it is open to the parties to enter into the question of their regularity." In *Plummer v. Woodburne* (2) a plea stated that the plaintiff had impleaded the defendant on a plea of trespass on the case upon promises in a court of judicature in the island of St. Christopher, for the same causes of action as those mentioned in the declaration; that the defendant pleaded *non assumpsit*, upon which issue was joined, and that the jury found for the defendant, with one penny costs; that judgment was given for the defendant upon that verdict; and that that judgment was afterwards affirmed, first by a court of error in the island, and afterwards by the King in Council: but it was held, that the plea was bad, inasmuch as it did not appear that the judgment at St. Christopher's was final and conclusive in the colony itself, so as to bar the plaintiff from another action there. The defendant, therefore, should at least have pleaded that this judgment was binding on the parties in the colony. It is no more than an account stated, on which the plaintiff might sue here in assumpsit; *Walker v. Witter* (3); and even in this country, a decree in Chancery to account is no bar to an action for the amount due. It would not amount to an estoppel, for estoppels must be mutual, and there would be nothing in this judgment to bar the defendant from proceeding against the plaintiff on matters arising *out of the same dispute. *Burrows v. Jemino* was a proceeding *in rem*, the foreign Court having vacated the acceptance, so that it ceased to exist.

Then, the seventh plea is ill for not showing a privity between the plaintiff and defendant, and for not alleging accord as well as satisfaction: *Grimes v. Blofield* (4), *Peytoe's case* (5).

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(1) 10 R. R. 443 (11 East, 118).

(2) 4 B. & C. 625.

(3) 1 Dougl. 1.

(4) Cro. El. 541.

(5) 9 Co. Rep. 77 b.

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And the replications are sufficient.

(TINDAL, Ch. J. : You may confine yourself to the replication to the seventh plea.)

As to the objection that it shows a cause of action in trespass, trover is a concurrent remedy : *Branscomb v. Bridges* (1), *Foster v. Allanson* (2).

(TINDAL, Ch. J. : The short answer to that objection is, that that which is a departure in pleading is a variance in evidence ; and if the evidence in support of the replication would sustain the allegation in the declaration, there is no departure.)

Then, as to the alleged duplicity, the traverse of matter of inducement is mere surplusage, and *utile per inutile non vitiatur* : Co. Litt. 303 a ; Stephen on Pleading, 419.

The COURT, thinking the replication to the seventh plea open to objection, gave leave to amend, and called on

Henderson to support the fifth plea :

The judgment of the Court at Sierra Leone is *prima facie* conclusive, and there is no authority which decides that such a judgment is not a bar. *Buchanan v. Rucker* and *Cavan v. Stewart* proceeded on the ground that the defendant had never been within the jurisdiction of the Court ; here, as required in *Obicini v. Bligh* (3), the plea avers that he was within it ; and in *Becquet v. M'Carthy* the judgment was supported against the defendant, *who had resided in the colony, but was absent during the whole of the proceedings. The judgments of foreign Courts are to have credit for correctness of proceeding : *Arnott v. Redfern* (4), *Burrows v. Jemino* ; and the latter case was not a proceeding *in rem*, but a judgment upon a legal right. Undoubtedly, the proceedings of foreign Courts have been questioned at Nisi Prius ; but proceedings inconclusive at Nisi Prius may operate as an estoppel if pleaded. (The authorities are all collected in *Plummer v. Woodburne*.)

And supposing the judgment to be equivalent only to an award, or an account stated, it may still be a good bar to an action for the same cause : for the relative position of the parties is altered : the plaintiff has no longer a claim for unliquidated damages ; the

(1) 25 B. R. 335 (1 B. & C. 145).

(2) 2 T. R. 479.

(3) 34 B. R. 730 (8 Bing. 335).

(4) 3 Bing. 353.

judgment has ascertained and concluded the amount; and for that amount, if for any thing, not for the original cause, the plaintiff must sue: so that, at all events, the plaintiff has adopted a wrong form of action.

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It is true that in conveyances, estoppels must be mutual; but that does not apply to the judgment of a Court; and the plaintiff is precluded from averring that he has obtained judgment by wrong: *Prudham v. Phillips* (1). The judgment will have no operation, if it be not a bar to proceedings in another Court for the same cause of action; and by pleading over, the plaintiff has admitted the jurisdiction of the colonial Court.

TINDAL, Ch. J.:

It appears to me that the plea which is pleaded fifth in order is substantially bad. This is an action which is brought to recover damages for seizing and taking the ship and boat of the plaintiff, and certain goods that were therein; and the answer that is set up by the fifth plea is, that the plaintiff brought *an action against the present defendant, in the Vice-Admiralty Court in the colony of Sierra Leone, and has recovered in that action the sum of 596*l.* by default, there being no appearance. The parties (or at least one of them) went before the Registrar of the Court, when the damages were assessed at a certain sum, and sentence afterwards was affirmed by the Court.

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The broad question therefore is, stopping at that plea, whether it is a plea of judgment recovered so as to deprive the plaintiff of a right of action on his original ground of action in our Courts here, or whether it amounts to any thing more than an agreement between the parties as to the extent of damage the plaintiff has sustained.

It is admitted that no case can be cited on the part of the defendant to show that a judgment recovered in a Vice-Admiralty Court is to stand upon the ordinary footing of a judgment recovered in our courts of common law. The ground on which a plea of judgment recovered bars the plaintiff from any further action is, that the original nature of the debt, or damage, where it may be sought to be recovered, is changed: that he has a higher remedy; he has a judgment in a court of record on which he can issue an immediate execution: and inasmuch as an immediate execution could be issued on his judgment, it would be a very superfluous matter, and give

(1) Ambler, 763.

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great encouragement to litigation, if he were allowed to commence *de novo*, and bring another action on that which was the original ground of complaint.

Therefore, it has been always held, that whether in an action of debt or for damages, the cause of action has itself merged and become extinguished in a remedy of a higher nature, where there is a judgment obtained in a court of record in this country.

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Now, in the first place, the Court here is not a court of record at all: it is a Vice-Admiralty Court in a *foreign colony belonging to the Crown. The judgment cannot be put on a higher footing than a judgment recovered in a common law proceeding, in the Courts of that colony. Perhaps it is putting it rather higher than it deserves if it is rated so high. Admitting it, however, so to be considered, we all know that any mode by which an execution can be taken in this country on a judgment recovered in a colonial Court is not by proceeding on that judgment itself, but by a new action brought, in which the judgment forms evidence, or is in the nature of evidence of a contract between the parties.

The first ground of objection then, is this broad one, that whereas in a judgment recovered in a court of record here, the plaintiff has an immediate remedy by writ of execution, he can, in this case, only have recourse to another action for the purpose of enforcing his demand. Great doubts have formerly existed (and some degree of doubt still exists) whether a judgment so recovered is conclusive between the parties, or whether the matter may be opened and agitated in this country. That question has been a good deal entered upon by Chief Justice EYRE in *Phillips v. Hunter* (1). If, then, the judgment has not altered the nature of the rights between the parties, we want some authority to see that the plaintiff is to be deprived of the remedy which every subject has of bringing his action in the Courts here for the damages he has sustained. It appears to me he has his option, either to resort to the original ground of action, or to bring an assumpsit on the judgment recovered. This appears to have been the opinion of the Court in *Hall v. Odber*, where Mr. Justice BAYLEY states the distinction: "This being only a foreign judgment, did not merge or extinguish *the plaintiff's simple contract debt, which can only be done by converting it into a debt of a higher nature: it is only evidence of the debt." There, the action being brought in the foreign Court upon an account stated

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and in a Court here upon the judgment, it was held that the party might still maintain his action on the account stated ; which would be quite inconsistent with the doctrine now attempted to be supported by the defendant, that the original ground of action is extinguished and merged between the parties.

That being the case on general grounds, let us see whether, in this particular instance, there is not something beyond it ; let us look at what the plaintiff has replied to this. The effect of the plaintiff's replication is this,—he shows some matters by which at least *prima facie* the judgment relied on is a void judgment ; for he says, at the time of the suit being commenced, and from that time down to the termination of the suit, not only was the defendant in that action absent from the place, but that he had no person whatever, no agent, or any other person on whom any process or monition from the Court could be served, or who could answer for him. Till that is answered by showing that there was some law in the colony from which, in the situation the party was, the judgment would not be a void one, we must say the plaintiff is setting up that which, if unanswered, shows it to be a void judgment. In *Plummer v. Woodburne* the Court says, that before you set up a foreign judgment as conclusive in the nature of an estoppel between the parties, it must appear on the record that it is decisive and binding between them in the colony where the judgment is given. That does not appear here ; and therefore on both grounds I think the plea is a bad plea, as far as the foreign judgment is concerned. There must, therefore, be judgment for the plaintiff.

VAUGHAN, J. :

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In order to be a bar to an action here, the judgment in the Colonial Court must be final and conclusive between the parties, which *Hall v. Odber* and *Plummer v. Woodburne* show clearly it is not.

BOSANQUET, J. :

I am of the same opinion. In this case the judgment of a foreign Court has been pleaded as a bar to a count in trover, on the ground that the cause of action *transiit in rem judicatam*. The foreign Court is not a court of record, nor is it adequately averred to be so on the face of the plea. But it is contended that at all events the cause of action is changed. The judgment of a foreign Court, however, amounts only to an agreement on which an action of assumpsit will lie, but does not constitute a debt of a higher order ;

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and if we take the case of a tort, in which the parties have agreed to estimate the damages at a certain sum, such an agreement would not be pleaded as a bar to the damages, and, according to *Hall v. Odber*, it does not change the cause of action. Although it may amount to accord, it does not constitute satisfaction, and cannot be a bar to a suit for the original cause of complaint. It appears, too, by the replication in this case, that the defendant was out of the jurisdiction of the Court at the time judgment was given against him; and there is nothing on the record which shows any law of the colony that such a judgment is binding.

ERSKINE, J.:

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Taking the distinction made by Chief Justice EYRE in *Phillips v. Hunter* (1) to be correct, that where a party seeks to enforce in our Courts the judgment of a foreign Court, it is consideration sufficient to raise a promise, and examinable as matter *in pais*, but in other cases is conclusive,—I think that this *judgment is no bar to the present action. I also agree that it is not sufficiently shown by the plea that, by the law of the colony, such a judgment was binding on the defendant.

Judgment for the plaintiff on the fifth plea.

1889.
Jan. 26,

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EX PARTE ANN SHIRLEY.

(5 Bing. N. C. 226; S. C. 7 Scott, 174; 1 Arn. 484; 3 Jur. 125; 7 Dowl. P. C. 258.)

Under ss. 77 and 91 of the Fines and Recoveries Act, the Court of C. P. authorized a *feme covert* to convey her copyhold property, her husband having resided abroad for more than twenty years with another woman.

WHATELEY applied under the 3 & 4 Will. IV. c. 74, ss. 77, 91, for the sanction of the Court to a conveyance of copyhold property by a married woman, without the concurrence of her husband.

The property in question had been devised to the applicant, to her sole and separate use, by her father, who died in 1826.

Her husband had been living abroad with another woman ever since 1817.

(TINDAL, Ch. J.: If the property is copyhold you need not come here.)

(1) 2 R. R. 363 (2 H. Bl. 403).

By s. 91 this Court may dispense with the concurrence of the husband in any case where he is living apart from his wife.

Ex parte
ANN
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TINDAL, Ch. J.:

That over-rides the seventy-seventh section, which seems to exclude copyholds.

Fiat.

BRAYSHAW v. EATON (1).

(5 Bing. N. C. 231—235; S. C. 7 Scott, 183; 1 Arn. 466; 8 L. J. (N. S.) C. P. 157; 3 Jur. 222.)

1839.
Jan. 29.
[231]

In an action against an infant for the price of necessities furnished to him, enquiry by plaintiff as to defendant's circumstances is not a condition precedent to the right to recover.

To an action on a tailor's bill the defendant pleaded infancy, and the plaintiff replied that the articles provided were necessities.

At the trial before the under-sheriff of Middlesex, it appeared that the defendant, whose mother lived at *Newcastle under Lyne, was articled to an attorney in London, where the plaintiff carried on business.

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The articles, for which the plaintiff sought to recover 9*l.* 15*s.*, were a Newmarket coat, a great coat, and a pair of trowsers, furnished to the defendant in July and August, 1836.

The defendant's mother proved that she had well provided him with clothes, and that between January and July, 1836, he had had two coats, two pairs of trowsers, a cloak, and a waistcoat.

The plaintiff had made no enquiry before he supplied the defendant.

The under-sheriff having left it to the jury to decide whether or not the articles in question were necessary for the defendant, the jury found a verdict for the plaintiff, which

James moved to set aside, on the ground that the plaintiff should have been nonsuited, because he had made no enquiry; and that the verdict was against the evidence. In *Ford v. Fothergill* (2) Lord KENYON said that he was of opinion the tradesman was bound to make such enquiry, and if the infant had contracted other debts

(1) Referred to in judgment of the COURT delivered by WILLES, J. in *Ryder v. Wombwell* (Ex. Ch. 1868) L. R. 4 Ex. 32, 42, 38 L. J. Ex. 8, 12; and discussed in *Barnes v. Toye* (1884) 13 Q. B. D. 410, 53 L. J. Q. B. 567;

and see *Johnstone v. Marks* (1887) 19 Q. B. D. 509, 57 L. J. Q. B. 6, and Sale of Goods Act, 1893, s. 2.—R. C. (2) 3 R. R. 695 (1 Peake, 301; 1 Esp. 211).

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at the same time, for the same sort of articles for which the action was brought, that such was good evidence to rebut the presumption of necessities.

Cook v. Deaton (1), *Story v. Pery* (2), *Burghart v. Angerstein* (3), *Mortara v. Hall* (4).

A rule *nisi* having been granted,

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Wilde, Serjt., who showed cause, contended that this was altogether a question for the jury. Although it *might have been prudent in the plaintiff to have made enquiries, or he might be morally bound to do so, he was not legally bound; for the only question here was, whether or not the articles were necessary, and plaintiff's enquiries could have no bearing on that question. Whatever might have been the result of his enquiries the articles might still be necessary; and as to the suggestion of a nonsuit, if any one of the articles furnished fell within the description of necessities, the evidence ought to be left to the jury: *Maddox v. Miller* (5).

In *Ford v. Fothergill* the verdict was for the plaintiff, and the defendant never moved to set it aside. In *Mortara v. Hall* the infant had 200 pairs of gloves, besides ladies' gloves.

James, in support of the rule, relied on the language of the Judges in *Ford v. Fothergill*, *Story v. Pery*, and *Cook v. Deaton*, that if a tradesman gives credit to an infant he does it at his peril. The *onus* therefore is cast on him to show that the goods furnished were necessities; and he can only establish that, by proving that he has made enquiries as to any previous supply. The under-sheriff should, at least, have directed the jury to find whether or not the plaintiff had made any enquiry, and whether or not the infant had before been sufficiently supplied.

TINDAL, Ch. J.:

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The issue for the jury in this case was, whether the articles supplied were necessary for the defendant or not: and after a verdict for the plaintiff, a motion has been made to enter a nonsuit, or for a new trial, on the ground that the under-sheriff did not direct the jury, that to entitle the plaintiff to *recover it was necessary he should establish that he had made due enquiry as to

(1) 33 R. R. 656 (3 Car. & P. 114).

(2) 4 Car. & P. 526.

(3) 6 Car. & P. 693.

(4) 6 Sim 465.

(5) 14 R. R. 565 (1 M. & S. 738).

the defendant's circumstances. We are, therefore, called upon to say that such enquiry is, by an inflexible rule of law, a condition precedent to the plaintiff's recovery. That it is prudent in a tradesman to make such enquiry, is clear: but he is not bound to make it by any inflexible rule of law. The question in these cases is, whether the articles furnished were necessary for the defendant; and that question is independent of any enquiry the plaintiff could make. After every enquiry that could be made, it might still turn out that the goods were necessary. The proposition, therefore, in the books, as to the necessity of enquiry, must be understood with reference to the prudence of such a step, and as of a duty of imperfect obligation. I find no authority which lays it down that such enquiry is essential to the plaintiff's right to recover: on the contrary, in *Ford v. Fothergill*, on which the defendant relies, the verdict was for the plaintiff, and no motion was made to set it aside.

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We cannot, therefore, accede to the motion for a nonsuit: and if we come to the question, whether the articles were necessary or not, there seems to be no reason for impeaching the decision of the jury—one of the articles, at least, the great coat, cannot be considered as unnecessary for a person in the defendant's sphere.

VAUGHAN, J. :

I am of the same opinion. The defendant's counsel contends for a proposition broader than any of the authorities warrant, namely, that enquiry is a condition precedent to the plaintiff's right to recover. The supply here appears to have been reasonable; and "necessaries" is a word of relation: what is not necessary in one station may be necessary in another. I *should say that a great coat was necessary for this defendant. In *Story v. Pery* and *Bainbridge v. Pickering* (1) it was proved that the defendant had been amply supplied by his father. I see no reason for disturbing the present verdict.

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BOSANQUET, J. :

I do not say that if I had been on the jury I should necessarily have found the same verdict; but I concur in thinking that we ought not to grant a new trial. Some of the articles were necessities; and it has been laid down that if any of them be such, the question ought to be left to the jury. It is said, indeed, in several

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of the cases, that the plaintiff ought to make enquiries; but the consequence is, not that he should be nonsuited if he fails to do so, but that he trusts the defendant at his peril. If that be so, the only question here, is, whether or not the articles were necessities: that, has been left to the jury, and I see no reason for disturbing the verdict.

ERSKINE, J.:

Under all the circumstances I think this was a question for the jury; and though some of the cases lay it down that the plaintiff ought to make enquiry previously to supplying the goods, that cannot be a condition precedent to recovery if it appear that the articles were necessary for the defendant. In the present case that question was fairly left to the jury, both as to quantity and quality; and though as to some of the articles I should not have found the same verdict, that is no reason for setting it aside.

Rule discharged.

1839.
Jan. 30.
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ADEANE v. MORTLOCK.

(5 Bing. N. C. 236—245; S. C. 7 Scott, 189; 1 Arn. 488; 8 L. J. (N. S.) C. P. 138.)

By an Enclosure Act, all ways over West Field were to be extinguished as soon as defendant should have made a new carriage road across it; provided that nothing contained in the Act should deprive plaintiff of the right of ingress and egress to and from a certain watercourse there, for the purpose of opening certain hatches, and cleansing the watercourse: Held, that plaintiff's right of way to the hatches, along the side of the stream, was not extinguished by defendant's having made a more circuitous track to the hatches, at some little distance from the side of the stream.

Held, also, that the occupier of a meadow, irrigated by means of the hatches, was (even before the Evidence Act, 1843) a competent witness in an action brought by the reversioner for the obstruction of the way.

THIS was an action of trespass on the case, in which the plaintiff claimed, amongst other matters, by the third and fourth counts of his declaration, a right of way out of the plaintiff's land, into and over a certain part of a certain road, and thence into and over the defendant's land in the parish of Little Abington in Cambridgeshire, unto certain sluices or staunches erected upon the defendant's land, for the purpose of repairing the said sluices or staunches which the plaintiff had always used for the irrigation of his own land; and also for the purpose of clearing the stream.

The defendant, by his plea, traversed the right of way claimed

in the third and fourth counts of the declaration, and thereupon issue was joined.

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At the trial before Parke, B., at the last Spring Assizes for the county of Cambridge, it appeared that the way, formerly a public footpath, claimed by the plaintiff as an approach to the sluices and flowing river, passed over the London turnpike road, which separated the plaintiff's lands from those of the defendant, over the defendant's fence by the side of the turnpike road, and thence through and over the defendant's lands, on the south side of and near to a small stream or watercourse called the flowing river, to the sluices. The fence of the defendant's lands next to the turnpike road was six or seven feet high, and had been erected ever since the enclosure of the parish in 1801 and 1802.

Before the enclosure of the parish, three different approaches had been used by the plaintiff's father, to the sluices and flowing river, over a certain open and common field called West Field. The Little Abington Enclosure Act directed, that West Field should be set out and allotted to Mr. Mortlock, the defendant, which was effected by the commissioners' award: by section 18 it was enacted that all carriage-roads, bridle-roads, and footways, over or across that part of West Field to be allotted to Mr. Mortlock, should be extinguished from the time the public road thereafter directed to be made at the expense of the said Mr. Mortlock should have been formed and put into good and sufficient repair fit for the passage of cattle and carriages; provided that nothing contained in the Act should extend or be construed to extend to deprive Mr. Adeane, his heirs or assigns, or his or their agents, servants, &c., with or without horses, carts, and carriages, of the right of ingress, egress, and regress to and from the ancient cut or watercourse, and every part thereof, used to float certain meadow grounds in Babraham, belonging to Mr. Adeane, for the purpose of rebuilding, repairing, opening, or shutting the sluices or staunches erected on the said watercourse, nor to deprive Mr. Adeane, his heirs or assigns, or his or their agents, servants, or workmen, of the liberty of ingress, egress, &c., at all reasonable times to and from the cut or watercourse, and every part thereof, to cleanse the said cut or watercourse, or for any other reasonable purpose relating to the watercourse.

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By section 15 the commissioners were directed, with consent of owners, to set out and appoint such public carriage roads, highways, bridle-ways, and footpaths over the lands directed to be divided and inclosed as they should think proper; also, to set out

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and appoint, with consent of owners, such private roads and ways, fences, *ditches, and works, &c., over the said lands as they should think necessary or convenient; also, to stop up, alter, turn, or discontinue any old road or roads, way or ways; and that after the said public and private roads and ways should be set out or altered, no person should use any ancient or other roads or ways, either public or private, either on foot or with horses, carriages, or cattle.

By clause 17 the commissioners were authorised and required to set out and appoint a public carriage road across West Field, and the expense of forming the same was to be paid by Mr. Mortlock. And

By clause 19 it was enacted, "that whereas there was more land in the parish of Little Abington, lying on the west side of the London road, than Mr. Adeane could claim to been titled to under the Enclosure Act, and it would be convenient he should have the whole on the west side, he should be permitted to purchase and pay for, in money, all that would not otherwise be assigned or allotted to him."

As soon as the commissioners had made their award, the defendant inclosed West Field; erected the fence before mentioned, commencing at the stream and running northwards along the side of the turnpike road for about two furlongs: at that point the defendant made a carriage road leading eastward from the turnpike road across West Field, and parallel with the stream for about three furlongs; the new road, then, turning at right angles, led directly down to the sluices. If the plaintiff's servants pursued this course to the sluices, they had to traverse three sides of a parallelogram instead of one; they therefore, as soon as the defendant's fence was erected in 1802, made their way over it, and pursued their course by the side of the stream, as before: in consequence of which, the defendant placed tenter hooks on the fence, at the spot where the plaintiff's *servants scaled it, and removed some steps they had placed there to assist them in getting over. But the plaintiff's servants, after that, got over at a place two yards further on, times out of number.

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One of the witnesses called on the part of the plaintiff was the occupier of the meadow which was irrigated by means of the sluices in question. He was objected to on the part of the defendant, as having a direct interest in the event of the suit; but the learned Baron admitted him, after causing his name to be indorsed on the record, and directed the jury that the inclosure

had not affected the plaintiff's rights, which, as it appeared to him, were expressly reserved by the proviso in the eighteenth section.

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A verdict having been found for the plaintiff,

Kelly obtained a rule *nisi* to set it aside, on the ground of misdirection as to the construction of the Enclosure Act, and the improper admission of an interested witness.

By sect. 17 all former rights of way were expressly extinguished on the defendant completing the new carriage road over West Field; and the proviso in the eighteenth section, securing the plaintiff's right of way, was only intended to secure him an access to the sluices, which he still had by the defendant's new road; if he were entitled to approach them by the old track, and break the defendant's fence, the defendant had derived no benefit from the enclosure.

B. Andrews and *Byles*, who showed cause, contended that the language of the proviso in the eighteenth section was free from ambiguity, and reserved to the plaintiff not *a* right, but *the* right of ingress which then belonged to him; the defendant had no right to compel him to go further round, or to deprive him of a *path by the side of the stream, which was necessary, as well for cleansing the watercourse as managing the sluices.

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The Enclosure Act was in the nature of a contract between the various proprietors in the parish, and ought therefore to be strictly construed against the defendant. If the language of the Act were ambiguous, the presumption ought to be in favour of the plaintiff: *Scales v. Pickering* (1).

As to the witness, *Doddington v. Hudson* (2) was expressly in point, and established that he was admissible. In that case it was held, that in an action on the case by a reversioner, for an injury done to his inheritance by a stranger, the tenant in possession was competent to prove such injury.

Wilde, Serjt., *Kelly*, and *Gunning*, in support of the rule:

As the plaintiff derived a benefit from the Enclosure Act as well as the defendant, there is no reason for construing it strictly against the defendant: and the right of way reserved to the plaintiff, was not a right to enter West Field at the particular point where he

(1) 4 Bing. 448.

(2) 1 Bing. 257.

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climbed the defendant's fence, but the right he had to approach the sluices at all seasonable times. That right he might enjoy by the new road; and the increase of distance in so small a space was not sufficient to occasion inconvenience: the plaintiff, therefore, had his right, according to the proviso, and the old track was extinguished on the substitution of the new. The erection of the fence by the defendant in 1802, and his placing tenter hooks in 1818, together with the removal of the steps made by the plaintiff's servants, were cotemporaneous acts, which showed the construction put on the statute by the parties themselves, and also extinguished the plaintiff's right. From the length of time, even a release might be presumed.

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Then, the occupier of the meadow was improperly admitted as a witness. The irrigation of his land depending upon the free use of the sluice, he had a direct interest in the event of the suit, and was incompetent, on the same ground as a tenant who cannot be a witness for his landlord, defendant in an action of ejectment.

Doddington v. Hudson was decided on the ground that the damages to be recovered in that action would go wholly to the landlord, and could never be recovered by the tenant: here, the tenant sustains an immediate damage, if the landlord be impeded in the use of the sluices.

TINDAL, Ch. J. :

In this case I think the rule which has been obtained for a new trial ought to be discharged. On the trial of this cause there was in fact, looking to the evidence, only one right of way that was really in issue between the parties, that is, Mr. Adeane's right to enter on the premises of Mr. Mortlock in the place where there is now a gate, which has been set up for a considerable time across the former common and public footway. It appears to me that the intention of the Act of Parliament was merely to enclose, shut up, and extinguish the public footways across West Field. But if we look to the evidence in this cause, Mr. Adeane had something more than a right of footway, for he had not only a right to walk along this common footway by himself and his servants, but he had also a right to diverge from the path in various places, and in every case where it was necessary for the purpose of watching and looking at the watercourse that ran nearly parallel to the path.

When the Act of Parliament was passed, "that all carriage roads, bridle roads, and footways over and across that part of

West Field, which is to be allotted to Mr. Mortlock, shall be extinguished from the time the public *road is set forth," that right of way was extinguished as far as any public right was concerned. But there is an exception which expressly gives to Mr. Adeane, as one of the public, a right to use this road for ingress, egress, and regress for certain specific purposes. The words of the Act of Parliament that relate to Mr. Adeane's right are, " Provided always, that nothing in this Act shall extend, or be construed to extend to deprive Mr. Adeane, his heirs and assigns, or his or their agents, servants, and workmen, of the right of ingress, egress, or regress at all seasonable times whatsoever, to and from the ancient cut or watercourse, and every part thereof, used to float certain meadow grounds belonging to Mr. Adeane, for the purpose of rebuilding, repairing, opening, or shutting the sluices erected on the watercourse, and to cleanse the said watercourse."

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Now, in the first place, commenting only on the particular words of the clause ; the words are, not to extend to deprive him of something which he already had as contra-distinguished from the right which the public had. It shall not deprive him of his " right of ingress, egress, or regress at all seasonable times whatsoever, for the purpose of cleaning out the watercourse." I think those words, " the right of ingress, egress, or regress " point out the mode of entering, staying, and going out again, which he, at the time of this Act, used. And undoubtedly the bulk of the evidence is, that he went into the field at the place to which the several witnesses deposed.

It is true, that there is in this case evidence, that shortly after the passing of the Act of Parliament a fence was made, or pales were erected, and that sometimes spikes were put up, and at other times nails. One can easily conceive, that Mr. Adeane, who lived close to Mr. Mortlock, would acquiesce in any thing being put up which would keep the public away, so long as *his servants, when they thought it necessary, had the means of getting over ; one can easily suppose, that he would have acquiesced in it without any renunciation of his own right. There are certainly some parts of the case that point a little, or that turn the attention a little, to the circumstance of impediments cast in the way of the servants of Mr. Adeane, namely, that some steps were put up at one time, which afterwards were taken down. But these points were submitted to the jury ; the bulk of the evidence was clearly the other way ; and it seems to show that the right had been exercised from

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the period of the passing of the Act, with very slight interruption. And therefore, I think, both upon the interpretation of the Act and on the evidence in the cause, that the first point which has been submitted on the part of the defendant falls to the ground.

The second is, whether in an action by a reversioner against a stranger for an injury done to his reversion, in which the action sounds in damages, the person who is a tenant is a competent witness. He has got a bias upon his mind, because he may very well suppose that the effect of this action may ultimately tend to prevent the nuisance which the landlord complains of. But that seems, to my mind, to be nothing more than a possibility of a probable advantage; one of the advantages which the law has laid upon the degree of credit to be given to the witness, and not as an objection to be made to his competency. I think, therefore, upon the whole, the rule must be discharged.

VAUGHAN, J. :

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I am of the same opinion. It is clear that Mr. Adeane had the right in question when the Act passed, and that it was continued and confirmed by that Act: both the plaintiff and defendant were parties to the Act, and the right could not be reserved in terms more large or explicit. Then, if it was reserved, *has it been extinguished by anything that has occurred since the passing of the Act? Has the plaintiff exercised the right for the last twenty years? The evidence is, that ever since the passing of the Act he has used it times out of number. The effect of that evidence was entirely a question for the jury.

With respect to the witness, ever since the case of *Doddington v. Hudson*, such a witness has been esteemed competent; his position is not like that of a tenant who is called as a witness for his landlord, defendant in an action of ejectment, for if the verdict be against the landlord, the tenant is immediately turned out: here, though the plaintiff should be deprived of the way in question, he had still access to the sluices by another way. According to the principle established in *Bent v. Baker* (1), the witness was clearly competent, and to obviate the possibility of objection his name was indorsed on the record.

BOSANQUET, J. :

The first question arises on the construction of this Act of

Parliament, the eighteenth section of which provides that nothing contained in the Act should extend or be construed to extend to deprive Mr. Adeane, his heirs or assigns, or his or their agents, servants, &c. with or without horses, carts, and carriages, of the right of ingress, egress, or regress, to and from the ancient cut or watercourse, and every part thereof.

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It is not disputed that the way in question has been obstructed, but it is contended that a convenient access to the sluices has been substituted by the defendant, and that that is sufficient under the statute. If the Act were a contract, as it is argued for the defendant, it is not likely it would leave the plaintiff's right so vague *as to give rise to such a question. At all events, the word "deprive" must mean to take away something which the plaintiff had before; and when the Legislature says, the plaintiff shall not be deprived of the right of ingress, egress, and regress, it means ingress in the line before used by the plaintiff, provided he continues to use it for the same purpose.

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The admissibility of the witness was established by *Doddington v. Hudson* long before the recent Act passed, under which the name of an interested witness is indorsed on the record: the verdict would not have been evidence for or against him then, and it is clear it cannot be now; the only question is, whether he has a direct interest in the result of the suit: but a witness has such an interest only when he derives from the verdict a benefit which can be enforced by him as the result of the judgment: that he has none such here is quite plain; and, therefore, this rule must be discharged.

ERSKINE, J. :

The plaintiff's right to approach the sluices is not denied: the question is, whether he is entitled to approach them by the spot in dispute. Now, the eighteenth section of the Enclosure Act seems expressly to reserve the right as it was enjoyed before, and there is nothing in the evidence to show that the right has been released or extinguished.

On the question of the admissibility of the witness, the answer has been fully given by the learned Judges who have preceded me.

Rule discharged.

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CARDEN v. THE GENERAL CEMETERY COMPANY (1).

(5 Bing. N. C. 253—261; S. C. 7 Scott, 97; 8 L. J. (N. S.) C. P. 163; 7 Dowl. P. C. 275.)

By an Act of Parliament constituting a joint-stock company, the Company were to apply the first moneys received under the Act in discharge of the expenses incurred in obtaining the Act: Held, that plaintiff, though a member of the Company, might sue them for his time and trouble, and money expended in obtaining the Act.

THE declaration was as follows: The plaintiff in this suit, by W. P., his attorney, complains of the General Cemetery Company, who have been summoned to answer the said plaintiff by virtue of a writ issued on the 14th day of March, in the year of our Lord 1837, out of the Court of our Lord the King, before his justices at Westminster, in an action of debt; and he demands of them the sum of 6,000*l.*, which they owe to and unjustly detain from him: for that whereas, before the making and passing of a certain Act of Parliament made and passed at a certain session of Parliament holden at Westminster in the second and third years of the reign of our sovereign Lord the now King, entitled, "An Act for establishing a general cemetery for the interment of the dead in the neighbourhood of the metropolis," to wit, on the 1st day of July in the year of our Lord 1832, the said plaintiff bestowed his work and labour, of great value, to wit, of the value of 5,000*l.*, and paid, laid out, and expended, divers sums of money, amounting in the whole to a large sum of money, to wit, *the sum of 1,000*l.*, in and about the applying for, obtaining, and passing, the said Act of Parliament, and in and about divers other matters and things and expenses preparatory and relating thereto; and whereas also, after the making and passing of the said Act of Parliament, to wit, on the 12th day of July in the year of our Lord 1832, and on divers other days and times between the said last mentioned day and the commencement of this suit, the said General Cemetery Company, under and by virtue of the said Act of Parliament, and of the powers and provisions therein contained in that behalf, raised and received divers sums of money, amounting in the whole to a large sum, to wit, the sum of 20,000*l.*, out of which the said Company might and ought to have paid and satisfied the said plaintiff the said sums of money; and thereupon it became and was the duty

(1) Cited and applied by WILLES, J. in *Lee v. Bude, &c. Ry. Co.* (1871) L. R. 6 C. P. 576, 580, 40 L. J. C. P. 285, 288; referred to and distinguished by

COTTON, L. J. in *Ex parte Hanly, Re Skegness, &c. Tramway Co.* (1888) 41 Ch. D. 215, 233, 58 L. J. Ch. 737, 745.—R. C.

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of the said General Cemetery Company, out of the said sums of money so received by them as aforesaid, to pay to the said plaintiff the said several sums of 5,000*l.* and 1,000*l.*; yet the said General Cemetery Company did not, in the first place, lay out and apply, nor have since—although often requested—in any manner whatsoever, laid out or applied the said sums of money so by them raised and received as aforesaid, or any part thereof, in or towards paying or discharging the said sums of 5,000*l.* and 1,000*l.* so due and owing to the said plaintiff as aforesaid: whereby, and by reason of the non-payment of the said several monies respectively, an action hath accrued to the plaintiff to demand and have of and from the said General Cemetery Company the said several monies respectively, amounting to the said sum of 6,000*l.* above demanded; yet to pay the same, or any part thereof, the said General Cemetery Company have hitherto wholly refused, and still refuse, to the damage of the said plaintiff of 10*l.*, and therefore he brings his suit, &c.

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Pleas; second, that the plaintiff bestowed his said work and labour, and paid, laid out, and expended, the said monies in and about the applying for, obtaining, and passing the said Act of Parliament in the declaration mentioned, and in and about the said other matters and things and expenses preparatory and relating thereto, as in the declaration mentioned, voluntarily and of his own accord, without the request of any person whatsoever, and without any contract or agreement expressed or implied with any person whatsoever for the payment of any money for the said work and labour, or the repayment of the said monies so paid, laid out, and expended, as aforesaid, or any part of them; and that, the said Company were ready to verify, &c.

Third, that no account or particulars of the said work or labour so alleged to have been bestowed by the plaintiff, and of the said monies so alleged to have been paid, laid out, and expended, as in the declaration mentioned, with dates and other necessary particulars, vouchers, receipts, and documents relating thereto, was made and delivered to the said Company, or the directors thereof, or any of the officers of the said Company on their behalf, at any time before the commencement of this suit, in order that the same might be examined by the said Company, or the directors or auditors thereof, or other the officers of the said Company on their behalf: and that, the said Company were ready to verify, &c.

Demurrer and joinder.

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W. H. Watson for the plaintiff :

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The statute 2 & 3 Will. IV. c. cx. after reciting that it would be of great public advantage if a general cemetery, on an extensive scale, were established in an open situation adjacent to the metropolis, for the interment of *the dead, under certain regulations and restrictions; and that the several persons thereafter named (including the plaintiff) were willing, at their own costs and charges, to establish such cemetery; and constituting them a body corporate by the name of "The General Cemetery Company," enacts, s. 20, "that all the money to be raised by the said Company by virtue of this Act shall be laid out and applied, in the first place, in paying and discharging all costs and expenses incurred in applying for, obtaining, and passing this Act, and all other expenses preparatory or relating thereto, and the remainder of such money shall be applied in and towards purchasing lands, tenements, and hereditaments, and making and maintaining the said cemetery, and other works by this Act authorised to be made, and in otherwise carrying this Act into execution." The pleas admit that the plaintiff has done the work alleged in the declaration, and it is no answer to his demand to say that he was a volunteer, or that he has not delivered particulars with dates. Sect. 20 provides for the payment of all expenses incurred in obtaining the Act; no distinction is made between volunteers and hired agents, nor is the delivery of a particular with dates made a condition precedent. *Tilson v. Warwick Gas Light Company* (1) is a direct authority that debt lies in such a case: there, an Act of Parliament for incorporating a Gas-light Company enacted, that all the costs of obtaining the Act should be paid and discharged out of the monies subscribed, in preference to all other payments; and it was held, that the attorneys who obtained the Act might maintain an action of debt founded upon the statute, for their costs. See also *Vin. Abr. Debt, (I) 2. Com. Dig. Action on Statute.*

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Sir W. W. Follett, contra :

This action is not maintainable by the plaintiff, who is himself, as appears by the recital of the Act, a member of the Company.

The twentieth section only authorises the Company to administer their funds in a legal manner, but not to give money to a mere volunteer. It confers no right on the plaintiff that he had not

before; and before the Act he could not claim payment for voluntary services. If one volunteer may claim, so may ten thousand, to the destruction of the Company's funds.

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But the declaration is ill. It does not allege that the plaintiff's services had any effect in procuring the Act of Parliament, or that they were of any value to the defendants, or even that he had any connexion with the Company. It does not aver that the defendants had sufficient funds to pay all demands, or even to pay the plaintiff. If they had sufficient funds, then the action is misconceived: it ought to have been case for a misapplication, and not debt. The twentieth section creates no debt for the plaintiff, but merely gives a direction to the Commissioners. The authority of *Tilson v. Warwick Gas Light Company* is questionable: but at all events the case is distinguishable from the present, for there it was alleged that the plaintiff was retained to solicit, and did solicit, the Act of Parliament; and the Court must have proceeded on the ground that the language of the Act had reference to the solicitor's bill.

W. H. Watson, in reply:

The objections now taken to the declaration are only open to the defendants on special demurrer: *Tilson v. Warwick Gas Light Company*. But the declaration does aver that the Company had funds out of which they might have paid the plaintiff; *and according to *Cane v. Chapman* (1), the Court will not intend that there are other charges. If the funds were exhausted, the defendants might have pleaded the fact.

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Cur. adv. vult.

TINDAL, Ch. J.:

The whole of the argument in this case, although it arose upon a special demurrer to the second and third pleas of the defendants, has turned upon the validity of the declaration; for as to the two pleas which are demurred to, it was virtually admitted on the part of the defendants, that they are not sufficient in law.

The defendants have therefore insisted upon various objections against the right of the plaintiff to recover in this form of action, as appearing upon the declaration; and the question is, whether any of those objections are available in law.

The first objection which has been raised is, that as the plaintiff had no legal claim against any one before the passing of the Act

(1) 5 Ad. & El. 647.

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for his labour and expenses, the same having been bestowed and incurred without any request from any one, and therefore, as it is contended, gratuitously, so the Act never intended to give him a claim against the defendants which he had not before against some individual. But looking at the twentieth section of the statute under which the defendants were incorporated, we think the labour and expenses described in the declaration are precisely those which are intended by the twentieth section of the Act, to be paid and discharged out of the first monies which shall be raised by the Company by virtue of such Act. The Act probably contemplated the difficulty which would arise from many of the expenses being necessarily incurred, *and much care and labour necessarily bestowed before the Company were incorporated; and consequently at a time when there could be no privity of contract between the party who had so expended his money and bestowed his labour, and the Company; and therefore expressly directs that all the money to be raised by the Company by virtue of the Act shall be laid out and applied, in the first place, in paying and discharging all costs and expenses incurred in applying for and obtaining and passing the Act, and all other expenses preparatory or relating thereto. It seems therefore to us, that the very object of the clause was to give a remedy to the plaintiff where he had none before, whether or not by an action of debt, or by an action on the case, forms a separate and distinct ground of objection.

It was next objected, that it does not appear the labour and expenses were of any value to the defendants. To which it seems a sufficient answer, that the declaration alleges it to be labour and expense incurred in procuring the very Act of Parliament under and by which the defendants obtained their incorporation; that is, it was labour bestowed and expense incurred by the plaintiff, which the individuals who afterwards became the Company have adopted: and as to the amount in value of such labour and expenditure, the jury would have to fix that by their verdict.

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It was next objected on the part of the defendants, that the declaration does not state that the defendants had any money in their hands at the time the plaintiff demanded his debt, or at all events, that they had sufficient in their hands to satisfy the demand of the plaintiff. And if this objection had been made the ground of a special demurrer to the declaration, it might perhaps have been held that the allegation is insufficient for that purpose. But the declaration does in *fact allege, that the Company, after the

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passing of the Act, "under and by virtue of the Act did receive divers sums of money, out of which they might and ought to have paid and satisfied the plaintiff;" and we think this amounts in substance to an averment that the Company had enough to satisfy the plaintiff's demand, and therefore is sufficient upon a general demurrer. And if in fact the Company had never received money to such an amount as that out of it they might have paid the plaintiff's demand, the defendants could have traversed the averment; or, if they had received sufficient, but had expended what they received in satisfying other claimants who came equally with the plaintiff within the description contained in the twentieth section, the defendants might have pleaded this special matter as an answer to the action.

The last, and which appears the more important objection to the declaration was, that the action was misconceived; for that if any action is maintainable, it ought to have been an action on the case for the misapplication of the funds raised by the statute, but not an action of debt. That the plaintiff might have maintained an action on the case, for the breach of duty on the part of the defendants in their application of the funds, may perhaps be true; but we think at all events the plaintiff had his election under the circumstances to bring case or debt. The present declaration does not appear to us to be distinguishable in substance from that in *Tilson v. Warwick Gas Light Company* (1). There the declaration states the work and labour to have been done by the plaintiff, "on the behalf of certain persons projectors of a certain undertaking for lighting the town of Warwick with gas;" but who those projectors were, is left quite uncertain; no privity whatever is shown between those *projectors and the defendants to the action. In this case the declaration alleges the work and labour to have been bestowed by the plaintiff before the passing of the Act, without stating any body on whose behalf or request it was done: whether, however, it was performed without a request or at the request of a stranger seems immaterial. And in both the cases the declaration then proceeds to bring the plaintiff within the provision of each respective statute, directing the payment of his demand to be made out of the first monies to be raised under each Act. In the case referred to, it was said by HOLROYD, J., "that the facts stated in the first count were sufficient to show that the defendants were under a legal obligation to pay the money to the plaintiff." And

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further he adds that "the Act of Parliament directed that the costs of obtaining the bill shall be paid out of the first monies subscribed under the Act. When the money so subscribed came to the possession of the Company, they became by law liable to pay those costs; and the amount of them was money which the defendants owed to and unjustly detained from the plaintiff." We concur in this reasoning, and think it gives the answer to the last objection.

Upon the whole, we think the plaintiff is entitled to judgment.

Judgment for plaintiff.

1839.
 Jan. 11.

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G. GIBSON AND OTHERS, ASSIGNEES OF J. MALLANDAINE,
 A BANKRUPT, v. THE EAST INDIA COMPANY (1).

(5 Bing. N. C. 262—276; S. C. 7 Scott, 74; 1 Arn. 493; 3 Jur. 56; 8 L. J. (N. S.) C. P. 193.)

The retiring pension of a military officer of the East India Company, did not, upon his bankruptcy, pass to his assignees.

THE following case was submitted for the opinion of this Court :

The plaintiffs were assignees of the estate and effects of John Mallandaine, a bankrupt, and this action was brought to recover the sum of 182*l.* 10*s.*, being the half-yearly payment claimed to be due at Christmas, 1836, of a pension payable to the bankrupt by the East India Company, in consequence of his having served in India, as a military officer, the required period to entitle him to a pension equal to his pay as a lieutenant-colonel.

The declaration stated that, in consideration of certain services rendered to the defendants by J. Mallandaine, the defendants promised to pay him a yearly sum of 365*l.*, by two half-yearly payments; and the breach was, that they had refused to pay the plaintiffs, his assignees, a half-yearly payment, which became due after his bankruptcy. The defendants pleaded that they did not promise as alleged.

By one of their regular instructions, called military letters, addressed by the Court of Directors of the East India Company to their officers and servants at Madras, in the year 1796, it was ordered and declared, that every officer, after twenty-five years'

(1) Cited and applied in judgment of MALINS, V.-C. in *In re Tufnell* (1876) 3 Ch. D. 164, 175, 45 L. J. Ch. 731, 736, and of GROVE, J. in *Grant v. Secretary of State for India* (1877) 2

C. P. D. 445, 456, 46 L. J. C. P. 681, 688; distinguished by STEPHEN, J. in *Booth v. Trail* (1883) 12 Q. B. D. 8, 11, 53 L. J. Q. B. 24, 25.—R. C.

service in India—three years for one furlough being included—should be allowed to retire with the pay of the rank to which he might have attained.

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That instruction, or letter, was published by the *directors as one of the regulations of the East India Company's service many years before the bankrupt entered their army, and has continued in force, and been acted upon, ever since.

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The bankrupt entered the service of the East India Company in the year 1808; in 1829 the bankrupt had attained the rank of Lieutenant-Colonel in the Madras army, under an appointment, not under seal, from the Governor and Commander in Chief of the Fort and Garrison of Fort St. George and the Fort of Madras, and the rest of the council thereof; and previously to 1834 performed the requisite service to entitle him to his retirement and pension within the meaning of the said instruction: accordingly, he did retire in November, 1834; and on the 24th of November, 1834, according to the usual course, the Court of Directors, on his application, resolved, that Lieutenant-Colonel John Mallandaine, of the Madras establishment, be permitted to retire from the service on the full pay of Lieutenant-Colonel, namely, 1*l.* a day, the same to commence from the date of such application.

The pension was paid to J. Mallandaine by half-yearly payments, until his bankruptcy, which took place on the 29th of October, 1836.

The said sum of 182*l.* 10*s.* was paid by the defendants to J. Mallandaine after he became a bankrupt, and after the defendants had notice of his bankruptcy.

It was agreed that the Court should draw such inferences from the above facts as might appear reasonably to result from them: and if, in the opinion of the Court, the plaintiffs were entitled to recover, the judgment was to be entered for them, by confession, for 182*l.* 10*s.*; but if the Court should be of a contrary opinion, then judgment of nonsuit was to be entered.

The case was argued in Michaelmas Term by

Wilde, Serjt., for the plaintiffs:

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The bankrupt having entered the service of the East India Company, upon a contract which entitled him to a pension after twenty-five years' service, and having served his time, the pension became a legal right vested in him, and as such, passed to his assignees. The consideration having been executed, the bankrupt might have sued the Company on their contract; and the right of

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action also, passed to his assignees. A contract entered into by resolution of the Company, if confirmed by the Board of Control, is impliedly sanctioned by 33 Geo. III. c. 52; for, by sect. 125, no resolution of the Company shall be available in law for new pensions beyond 200*l.* per annum, unless approved and confirmed by the Board of Control.

There is no analogy between the pension in question, and the half-pay of officers in the army, for such half-pay is in the nature of a retainer for future services, and the receiver of it is always liable to be called on again; whereas here the party has ceased to be a soldier, and the Company has no further claim on him: and though formerly it was requisite that contracts entered into by corporations should, with some few exceptions, be by deed, yet, in modern times, that law has been greatly altered. In *The Mayor of Stafford v. Till* (1), and *The Mayor of Caermarthen v. Lewis* (2), it was held that a corporation might sue in assumpsit for use and occupation: and though, in *The East London Waterworks v. Bayley* (3), it was held that assumpsit would not lie for a corporation upon an executory contract, because it was thought there was no mutuality of remedy, yet in *Beverley v. Lincoln Gas Company* (4), it was decided that a corporation might be sued in assumpsit, as well as sue, where the contract has been executed; and in *Church v. *The Imperial Gas Light Company* (5), that it makes no difference as to the right of a corporation to sue on a contract entered into by them without seal, whether the contract be executed or executory; and Lord DENMAN, Ch. J. said, "The general rule of law is, that a corporation contracts under its common seal: as a general rule, it is only in that way that a corporation can express its will or do any act. That general rule, however, has, from the earliest traceable periods, been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit that a merely circumstantial difference is to exclude from the exception. This principle appears to be convenience amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed: hence the

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(1) 29 R. R. 511 (4 Bing. 75).

(4) 45 R. R. 626 (6 Ad. & El. 829).

(2) 6 Car. & P. 608.

(5) 45 R. R. 638 (6 Ad. & El. 846).

(3) 4 Bing. 283.

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retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions; on the same principle stands the power of accepting bills of exchange, and issuing promissory notes, by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon." Here, the bankrupt's contract with the Company was not such as could only be entered into by deed: it was not for an annuity, which must be by deed, and can be recovered only by writ of annuity: it differs in nothing from a contract for wages, upon which the employer may be sued at every period when the wages are payable. In *Moore v. Lewis* (1), it was held that an annual payment may be contracted for by parol: in *Binnington v. Wallis* (2), the consideration of the promise on which the plaintiff sued was an annuity granted by parol, and no objection was taken on that ground. In *Gibson v. Dickie* (3), an agreement by the defendant to allow the plaintiff, with whom he cohabited, in case they should separate, an annuity for her life, provided she continued single, was held valid. The bankrupt, therefore, might have sued the Company on this contract, and if the Legislature had intended that his pension should be inalienable, that intention would have been expressed in 38 Geo. III. c. 52: for Chelsea pensions are expressly made inalienable by 7 Geo. IV. c. 16, s. 26; Greenwich pensions, by 10 Geo. IV. c. 26, s. 3; excise pensions, by 7 & 8 Geo. IV. c. 58, s. 121, 54 Geo. III. c. 151; and half-pay, by 7 Geo. IV. c. 57, s. 29.

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Spankie, Serjt. for the defendants:

The allowance made by the East India Company to retiring officers is in the nature of the half-pay given to officers retiring from the service of her Majesty. It was always intended, and always has been considered in the nature of a personal gratuity, and has never been granted by deed, or in any form indicating that the defendants meant to become absolutely and irrevocably liable to the payment of such allowance: the circumstance of the allowance never having been granted by deed, shows that it was never treated, on either side, as part of the contract between the parties. And the grant is not for the benefit of the individual, but to ensure the general respectability of the service by enabling an

(1) 1 Ventr. 27; Sid. 413.

(3) 16 B. R. 333 (3 M. & S. 463).

(2) 4 B. & Ald. 650.

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officer of rank to support his station in society. All the circumstances must be taken into consideration. The allowance in question is no part of the original engagement; when the officer retires, he makes *his request; the Company take it into consideration; and the resolution follows: the directors of the Company are only the executive body, and many of their grants are subject to the revision of the Court of Proprietors. But if this were in any sense a contract, it was a contract for an annuity which can only be granted by deed: Co. Lit. 142; *In re Locke* (1); at all events, when granted by a corporation. It is true that, in certain excepted cases, such as those which have been referred to, a corporation may contract without deed, and sue or be sued in assumpsit; as, in order to carry on the business for which they have been created, or to appoint inferior officers, such as a cook, or the like: Bac. Abr. Corporation, p. 266. But they cannot grant an annuity by parol—*Moore v. Lewis* was not the case of a corporation—or make a parol demise: *Rex v. Chipping Norton* (2). The 33 Geo. III. c. 52, does not make a grant without deed binding, but superadds the necessity of confirmation by the Board of Control. The 53 Geo. III. c. 155, s. 88, has the same operation with respect to gratuities.

Therefore the Company, though liable *in foro conscientiae*, are not liable in a court of law. And it is contrary to public policy that such a grant should be assignable. Half-pay is not assignable: *Flarty v. Odum* (3), *Lidderdale v. Duke of Montrose* (4), *Stone v. Lidderdale* (5); nor any grant for public services: *Davis v. Duke of Marlborough* (6); nor an annuity *pro consilio impendendo*, unless the word assigns be found in the grant: *Maund's case* (7). The mention of half-pay in the Insolvent Debtors' Act, and of pensions in the other Acts which have been referred to, is only in the *way of more abundant caution. There is no such clause in the Bankrupt Act.

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Wilde, in reply :

With respect to the form of this grant, it is clear, from the case in Plowden, 131, down to *Binnington v. Wallis*, that a contract to make an annual payment may be valid without deed; *Ex parte Locke* only decides that an agreement to sell an annuity cannot be

(1) 2 Dowl. & Ry. 603.

(2) 5 East, 238.

(3) 1 R. R. 791 (3 T. R. 681).

(4) 2 R. R. 375 (4 T. R. 248).

(5) 3 R. R. 622 (2 Anstr. 533).

(6) 1 Swanst. 74.

(7) 7 Co. Rep. 112.

enforced at law as an annuity, even if enrolled;—and as to the substance,—the resolution of the directors is a binding contract; the Company having acted on it, and no Court of Proprietors having signified any dissent. The stat. 33 Geo. III. c. 52, is a legislative declaration that the funds of the Company are charged by such resolution.

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Nor, according to the modern authorities, is this a case in which a corporation can only contract by an instrument under seal. The territorial defence of India is one of the purposes for which the Company exists; and, according to *Beverley v. Lincoln Gas Company*, such purposes may be effected without affixing the Company's seal to every engagement. If engagements for soldiers' wages cannot be entered into without deed, neither can engagements for the salary of any clerk, porter, or captain of the Company's ships.

It is true that payments for continuing duties and continuing services, are not assignable; but debts for past services may be assigned: *Blackford v. Preston* (1); and there can be nothing in such an assignment contrary to public policy: the power of assignment gives the grantee a credit which he would not possess if the grant were inalienable. The Legislature has dealt with pensions from the East India Company as late as 1 & 2 Vict. c. 110. If it had been thought expedient to render *them inalienable, it would have been easy so to have provided in that statute.

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Cur. adv. vult.

TINDAL, Ch. J. :

The question before us will depend, as was admitted in the course of the argument, on the single point, whether the bankrupt himself, in case no bankruptcy had intervened, could have maintained an action against the East India Company for the arrears of his pension: for it is obvious, that the assignees cannot have any right of action in this case, independently of that which they derive from or through the bankrupt himself.

The general rule of law is not denied on the part of the plaintiffs to be, that no action founded on contract can be maintained against a corporation aggregate, unless where such contract is under the seal of the corporation. Such indeed is the language of all the authorities, beginning with those collected from the Year Books in Bro. Abr. tit. Corporations and Capacities, down to the latest of the present day: the ground of that rule, as it is to be extracted

(1) 4 R. R. 598 (8 T. R. 89).

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from such authorities, being, that as a corporation is a body politic and invisible, it can only act and speak by its common seal; or, as it is said *arguendo*, in *Rex v. Bigg* (1), “the common seal is the hand and mouth of the corporation.”

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But on this general rule, both in ancient, and still more frequently and largely in modern times, have exceptions been grafted; so that it is now undoubted law, that in very many cases, actions are maintainable in our Courts upon contracts entered into, by or on behalf of corporations aggregate, though such contracts are not under seal. It is only necessary to allude to one class of these exceptions, determined in very early times, which *relate to contracts, either expressly entered into by corporate bodies, or which result from acts done by them in matters of slight importance, of frequent recurrence, and of necessity for the existence and carrying on of the corporation itself; such as the employment of a butler or cook, or the appointment of a bailiff for distraining beasts *damage feasant*, and the like; because the case now before us cannot, upon any ground of analogy, be held to fall within this class: but our attention must be more particularly directed to that larger class of excepted cases which has grown up principally in modern times, where the contract which has been entered into is one of which the allowance is necessary for, or incidental to, the carrying into effect the very purposes and objects for which the corporation itself was originally created.

It is upon the principle and reason on which this class of exceptions is grounded, that the course of argument on the part of the plaintiffs has proceeded; and whether the contract now under consideration falls within this exception, or remains under the control of the general rule of law, is the question before us.

Now, allowing to this class of exceptions the widest range to which it has ever been carried, and taking it to have been correctly laid down in the late case of *Beverley v. Lincoln Gas and Coke Company* (2), it is this; that when a Company is instituted for the purposes of trade, such Company may, in matters of frequent requirement and of small amount, make a valid contract relating to the trade which they carry on, without affixing the common seal, although such corporation be a corporation aggregate, without a head. As in the case last cited, a Company created by Act of Parliament for the supply of gas may contract for gas meters for the purposes of *their trade, without

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(1) 3 P. Wms. 423.

(2) 45 R. R. 626 (6 Ad. & El. 829).

seal; and upon such contract may be held liable in an action of assumpsit for goods sold and delivered. And again, a Company so instituted may be liable upon a similar contract not under seal, although the contract be not executed, but executory only; as was determined in the case of *Church v. Imperial Gas Light Company* (1); and indeed the same principle, that a corporation established for the purpose of carrying on trade or manufacture may differ from other corporate bodies, as to the power of contracting in matters relating to the purposes for which the Company was formed, seems also to have been the opinion of Lord TENTERDEN, as may be collected from his judgment in *Dunstan v. Imperial Gas Light Company* (2). It becomes, however, unnecessary to refer to other cases bearing on this point, as they are all brought in revision by Mr. Justice PATTERSON, in giving the judgment of the Court of Queen's Bench, upon the case to which reference is first above made.

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In order to determine, whether the instructions and resolution of the Court of Directors of the East India Company to allow full pay to a retired officer, upon which the present action is founded, form a contract which falls within the principle of the exception above laid down, it will be necessary to refer shortly to the original formation of the East India Company, and the powers with which it has been at different periods invested by the Legislature, and then to consider the nature and object of the instructions, and that resolution founded thereon.

The stat. 9 & 10 Will. III. c. 44 (3), and the charter of incorporation granted by the King under the powers of that Act, form the foundation of the privileges of the present united East India Company. And from the provisions made by that statute it is evident, that the *Company was established, originally and in the first instance, for the purposes of trade only; namely of exclusively trafficking and using the trade of merchandise to and from the East Indies, and in all places between the Cape of Good Hope, and the Straits of Magellan, and with no other object or design. But, without adverting to various enlargements by the Legislature in subsequent reigns, of the term for which the charter was originally granted, it will be sufficient for the present purpose to observe, that about the commencement of the reign of George III., a question arose between the Government and the East India Company, as to the claim set up by the latter to the possession of the territorial

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(1) 45 R. R. 638 (6 Ad. & El. 846).

(3) Rep. S. L. R. Act, 1892.

(2) 37 R. R. 352 (3 B. & Ad. 125).

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acquisitions in India, which had been made by them; a claim inconsistent with the general principle prevailing in the law, both of this and other states, namely, that all conquests made by subjects must necessarily belong to the Crown. And in consequence of this contention an agreement was entered into between the Company and the public, "that the territorial acquisitions and revenues lately acquired in the East Indies, should remain in possession of the Company, and their successors during the term therein mentioned; an agreement which was carried into effect by the stat. 7 Geo. III. c. 57 (1). The term therein mentioned was afterwards enlarged, and the possession and government of the territorial acquisitions continued in the said united Company by subsequent acts of the Legislature, down to the present time; without prejudice, however, as declared by the preamble to the statute of the 53 Geo. III. c. 155, s. 61 (2), to the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland, in and over the same, or to any claim of the said united Company to any rights, franchises, or immunities."

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Upon this legislative authority, subject, however, to such control of the Crown as is provided by several *statutes, does the right of the Company to the possession and government of the territories acquired in the East Indies depend; and from the same legislative authority, without referring to many express provisions in subsequent statutes, it is manifest that the East India Company have been invested with powers and privileges of a twofold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown to be exercised by the Board of Commissioners for the affairs of India) power to acquire, and retain, and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native powers of India.

Now, upon the first view of the resolution to allow this pension, it is obvious that it could have no connection whatever with the condition or powers of the Company, as a trading community; and, consequently, that the exception which has been established as to contracts entered into by corporations instituted for the purposes of trade, in matters relating to trade, of daily occurrence and slight importance, cannot, upon any reasonable construction, be held to comprehend it. If this allowance of a retiring pension

(1) Rep. S. L. R. Act, 1867.

(2) Rep. as to Br. India, S. L. R. Act, 1873.

is to be considered as a contract in the legal sense of that word, it was a contract made by the Company in its political character as governors, not in their trading character as merchants. It related to the territorial and political branch, as distinguished from the commercial branch of the Company's affairs; (see 53 Geo. III. c. 155, s. 64), and all payments under it would be chargeable upon the territorial revenues only; (see 3 & 4 Will. IV. c. 85, s. 9 (1)). The resolution, however, is a general regulation, affecting the whole of the army, not a separate contract with any individual officer; and although it may differ, in some particulars, from a grant of half pay by the Crown to the officers of the army or navy, upon their retirement from actual service, yet it bears a much stronger analogy to it in the mode of its being granted, and in the consequences attending it, than to any contract. Now it is clear that no action could be supported against any one to recover the arrears of half pay granted by the Crown, at least unless the money has been specifically appropriated by the Government, and placed in the hands of the paymaster or agent to the account of the particular officer; and there is no ground upon general principle to hold that an action could be maintained against any one, unless under the same circumstances, in the present case.

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It was, indeed, strongly argued at the Bar, that as the resolution under which the retiring pensions are paid has been sanctioned by the Commissioners for the affairs of India, it has by such approval become obligatory on the Company, and in the nature of a contract; but we think there is no ground for giving such operation to the Act. The object of the statute (33 Geo. III. c. 52) was that of creating a Board of Commissioners to superintend, direct, and control the acts, operations, and concerns relating to the civil and military government or revenues of the Company's territories and acquisitions in the East Indies; to make the approval of the Board essential before instructions are sent out, but not to give additional force or legal obligation to the resolution itself beyond that which it originally possessed.

The grant in question, therefore, appears to us to range itself under that class of obligations which is described by jurists as imperfect obligations; obligations which want the "*vinculum juris*," although binding in moral equity and conscience; to be a grant which the East India Company, as governors, are bound *in foro conscientiae* to make good, but of which the performance *is to be

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sought for by petition, memorial, or remonstrance, not by action in a court of law.

Many grounds of inexpediency in allowing a claim of the present description to be recoverable in a court of law readily suggest themselves. If the retired pension which is given for former services can be recovered by action, why should not the pay and allowances for actual service be equally so during their continuance? And yet how frequently is it not only expedient, but absolutely necessary, that military pay should be suspended and kept in arrear beyond the day when it becomes due, and until the service, in respect of which it is earned, has been entirely completed? Not to mention the expense and inconvenience which must arise if a suit might be instituted by each individual officer, and the prejudice which such litigation would necessarily occasion to the military service. But if the allowance of this pension will furnish a ground of action against the Company, no legal distinction can be assigned why the grant of pay during actual service, which is authorised by general orders founded on resolutions of the directors, confirmed in the same manner by the Board of Commissioners, should not be equally the ground of an action at law.

It is enough, however, to say, that though the Company undoubtedly might, if they had thought proper, have made a grant under their common seal for the payment of this pension, by which they would have rendered themselves liable to an action in a court of law, yet they have not so done: and it appears to us, that this grant, not under seal, does not fall within the reason or principle of the exception which has been above adverted to; and, consequently, that it must be governed by the general rule of law, that a corporation aggregate cannot be sued upon a contract not being under their common seal.

[276] We therefore think the bankrupt himself could not have had a right of action against the Company; and that, consequently, no such right has passed to his assignees, and therefore we give judgment of

Nonsuit.

1839.
Feb. 8.

PENNEY v. SLADE AND ANOTHER.

(5 Bing. N. C. 319—332; S. C. 7 Scott, 285; 1 Arn. 539; 8 L. J. (N. S.) C. P. 200.)

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Seven borough magistrates, including the mayor, assembled to appoint overseers. The mayor drew from his pocket two blank forms, with three seals ready attached, filled them up with the names of two persons of his own political party, handed them to the two magistrates sitting next to

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himself, and, on their being signed, immediately despatched them by a constable to be served. As soon as the constable had left the room, the four other magistrates, who had not observed the mayor's proceedings, requested him to nominate two other overseers, and, upon his refusing to put the question, appointed them without his concurrence. The mayor afterwards caused a distress to be levied on the plaintiff for refusing to pay a rate made by the overseers appointed by the mayor. Plaintiff having sued the mayor in trespass, the jury were directed that they might find for plaintiff, if they thought the mayor's appointment of overseers to be fraudulent. The jury having found it not fraudulent, the Court refused a new trial, which was moved for on the ground, that whether the appointment were fraudulent or not, it was void, as being a judicial act done by the minority of the justices assembled, without opportunity of deliberation afforded to the entire body.

THIS was an action of trespass for seizing the goods of the plaintiff, under colour of a warrant signed by the defendants, who were magistrates of the borough of Poole, (one of them being the mayor,) for the purpose of enforcing the payment of a poor-rate, which was alleged by the plaintiff to be void, on the ground that the overseers, Sydenham and Custard, by whom it was made, had not been duly appointed.

At the trial before Lord Denman, Dorset Spring Assizes, 1838, it was proved on the part of the plaintiff, that notice had been duly given for holding, on the 6th of April, 1837, a meeting of magistrates for the appointment of overseers.

That at the hour of meeting, eleven in the forenoon, seven magistrates were assembled; viz., Mr. Slade the *mayor, Mr. Slade junior the late mayor (the two defendants), Captain Festing, Mr. Parrott, Mr. Seager, Mr. Clarke, and Mr. Brice. There were present also the magistrates' clerk and his assistant, together with a considerable body of spectators.

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Mr. Slade junior sat next to the mayor, and Captain Festing next to Mr. Slade junior.

A list of persons eligible to serve the office of overseer was then produced from the vestry, and the mayor read out the names.

Mr. Parrott objected to the list, that it appeared to be made for a political purpose, the names being taken almost exclusively from the Tory party, to which the mayor belonged, and proposed that one overseer of each political party should be appointed, from a more extended list. Mr. Seager, Mr. Clarke, and Mr. Brice concurred in this proposal.

The mayor said, "I shall appoint the two first names on the vestry list."

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Somebody then produced an extended list containing twelve names, which Mr. Parrott proceeded to read.

While he was in the act of reading, the mayor drew two blank forms of appointment from his pocket, with three seals ready attached to each, and after signing the instruments, handed them to Mr. Slade junior, who, after signing them handed them to Captain Festing; Captain Festing having signed them, they were handed back to the mayor, who immediately delivered them to the high constable; and the high constable instantly left the room to serve them on the parties concerned.

[*321] Two other magistrates, Colonel Pedler and Mr. Rickman, then came in. Mr. Parrott, Mr. Seager, Mr. Clarke, and Mr. Brice had not observed the mayor's proceeding, being engaged in the consideration of the extended list, and Mr. Parrott now proposed as overseers two other persons, Busson and Short, one of each political *party; Mr. Seager seconded the proposal; but the mayor refused to put the question, saying it was too late, as he had already made an appointment, and the high constable had gone to serve the parties.

The magistrates' clerk then put the question at the instance of Mr. Parrott, and took the votes *seriatim*; when six magistrates voted for Busson and Short, and Captain Festing and the two Messrs. Slade declined to vote.

It was the duty of the magistrates' clerk to provide, and he had with him on this occasion, blank forms for the appointment of overseers.

According to the testimony for the plaintiff, the proceeding on the part of the mayor as to the signature of the papers, and the handing them to the high constable was conducted with great despatch, and with the air of one who wished that the act should escape the observation of the other magistrates. The principal witnesses who deposed to this were an attorney who was accidentally present, and the magistrates' clerk's assistant, who also stated that the mayor some time afterwards said to him, "I did not expect to have got through it so well; nobody saw me but you; and I thought you would have spoken."

According to the testimony for the defendants, particularly that of Captain Festing, the mayor acted openly and deliberately, and no objection was made by Mr. Parrott till after he, Captain Festing, had signed the appointments, and the mayor was putting them into the hands of the high constable; Colonel Pedler and Mr.

Rickman, he said, arrived a minute or two after he, Captain Festing, had signed. Other witnesses, and among them Mr. Arnold the town clerk, made the same statement as to the mayor's conduct; the latter said, that Mr. Parrott's objection was not made till after the appointment was in the hands of the high constable, and that Colonel *Pedler and Mr. Rickman did not come in till ten minutes after the high constable was gone.

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These were the only points in which there was any difference between the statement of the plaintiff and that of the defendants.

The borough magistrates, in May following, being applied to to issue warrants against the plaintiff and others for non-payment of a poor-rate made by Sydenham and Custard, a majority of the magistrates dismissed the application; but the two defendants signed warrants notwithstanding, and the plaintiff's goods having been seized and sold, the present action was commenced.

Lord DENMAN, Ch. J. directed the jury that if they were of opinion the defendants had acted fraudulently in making the appointment of overseers, the appointment was void, and a verdict must be found for the plaintiff; if they had acted *bonâ fide*, the verdict should be given for the defendants.

The jury (special), after a brief deliberation, found a verdict for the defendants.

Crowder, in Trinity Term, moved for a new trial on the ground of misdirection, and that the verdict was against the evidence. Taking the case, even according to the testimony for the defendants, the jury could have paid no attention to the circumstance that the chief magistrate came to the meeting with blank forms in his pocket ready sealed with three seals, which forms it was the duty of the magistrates' clerk to provide and fill up, and that the only three magistrates who would sign those papers were seated next to each other: it was difficult to conceive for what honest purpose the chief magistrate should have taken upon himself the duties of an attorney's clerk.

But, assuming that there had been no fraud, still the appointment was void, because, even according to the *defendant's case, no opportunity of conference and deliberation had been afforded to the body of magistrates assembled to make the appointment, and it was made by a minority of that body.

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If two magistrates only had assembled, two would have been competent to make the appointment: but as more assembled, and

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as the appointment was a judicial act (*Rex v. Forrest* (1)), the question ought to have been put, and the whole body ought to have had the opportunity of deliberating, that the decision might be according to the sense of the majority.

In *Rex v. Forrest*, Lord KENYON said, "This is not merely a ministerial act; if it were like signing a rate, that might perhaps vary the question; but it is a judicial act, wherein the justices are to exercise a discretion. And in order to make this a good appointment, the justices should have acted together:" and ASHHURST, J. said, "The justices, in appointing overseers, do not act ministerially; the statute has vested a discretion in them, and they should act together. And, it being a matter of discretion, they should confer together for the purpose of a communication on the subject-matter on which they are to determine."

So in *Rex v. Hamstall Ridware* (2), Lord KENYON said, "The rule has been long settled to be that the concurrence of justices together is not necessary where the act to be done is merely ministerial; but they must confer together, and form a joint opinion where the act is of a judicial nature."

A rule *nisi* having been granted,

[After argument the COURT took time for consideration.]

[329] TINDAL, Ch. J. :

This was an action of trespass for seizing the goods of the plaintiff under colour of a warrant, signed by the defendants (who were magistrates of the borough of Poole, one of them being the mayor), for the purpose of enforcing payment of a poor rate, which was alleged by the plaintiff to be a void rate, on the ground that the overseers, by whom it was made, had not been duly appointed, but that their appointment was void.

Upon the trial of the cause at the last Spring Assizes for the county of Dorset, before Lord Denman, it was proved that a notice had been duly given for holding a meeting of the magistrates, for the purpose of appointing overseers. The meeting was attended by the mayor and six other magistrates, in the first instance; and two others came in afterwards, though at what particular period they arrived did not very clearly appear.

The appointment in question was signed at this meeting by the mayor and two others of the magistrates, and was immediately issued

(1) 1 R. R. 628 (3 T. R. 38).

(2) 3 T. R. 380.

to the parties thereby appointed; and it was contended at the trial, that this appointment was fraudulently and surreptitiously made by the magistrates who signed it, without the concurrence of the others who were present at the time, and met for the purpose of making the appointment, and without opportunity afforded them for deliberation.

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The question of fraud was left by Lord DENMAN to the jury, who found a verdict for the defendants, thereby negating the fraud imputed to them.

A rule *nisi* was obtained in the following Term for a new trial, on the ground of misdirection, or, in the alternative, as upon a verdict against evidence.

The ground on which the charge was impugned for misdirection was this:

The plaintiff contended, that the magistrates having assembled for the purpose of appointing overseers, which *is a judicial act (*Rex v. Forrest* (1)), the jurisdiction of the whole assembled body had attached, and that no appointment could be valid unless a majority of the assembly concurred in its being made, and that the jury ought to have been told that, even if there was no fraud, yet if, through ignorance of their duty, an appointment was made by some of the assembled magistrates without the concurrence of the majority, or opportunity afforded to the majority for deliberation, the appointment was void for want of jurisdiction; and that the point for them to consider was, whether the appointment had been made with the concurrence of the majority, and after opportunity for deliberation.

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If this objection is to prevail, it is difficult to say how far it will extend. Is it necessary that the magistrates should express their opinion in words, or will a silent assent be sufficient? Would it be allowable, in such a case as the present, for the plaintiff to go into evidence that such or such a magistrate voted against the appointment, but was misheard, or that the number of persons who had given their opinions was miscounted, or that some of the magistrates had been engaged in other matters, and had not been aware when the question was put?

In the case of *Rex v. The Justices of Leicestershire* (2), which arose out of an appeal against an order of removal, the Court of Quarter Sessions had been equally divided; but, through a mistake in reckoning the numbers, judgment was entered for quashing the order. An application was made to the Court of King's Bench

(1) 1 R. R. 628 (3 T. R. 38).

(2) 14 R. R. 494 (1 M. & S. 442).

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for a *mandamus* to the justices to enter continuances on the appeal to the next Quarter Sessions, and then to hear and determine the same.

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But the Court on cause shown refused the *mandamus*, *considering that a judgment having been entered in the Court below, the Court of King's Bench could not (as was said by Lord ELLENBOROUGH) hold a sort of balloting-box to ascertain the voices that were given, or whether they were correctly cast up.

Now this was a judgment confessedly wrong, entered up without any legal authority in any one to enter it, yet, as long as it remained unquashed on the files of a Court which had a jurisdiction over the subject-matter, the Court could not treat it as a nullity.

This case seems to furnish an analogy sufficient for the determination of the present case. Here is a judicial act performed without fraud, at a meeting which was competent in point of jurisdiction to perform it, and that act verified by a sufficient number of signatures to satisfy the requisitions of the statute which directs the appointment to be made. We think, therefore, that it cannot be questioned in this collateral way on the ground of an irregularity or miscarriage, in ascertaining the sentiments of the meeting.

We have the less hesitation in coming to this conclusion, because the law has provided appropriate methods of settling such a question. The appointment may be directly questioned by an appeal to the Sessions, or, if there is any impropriety in the mode of the appointment, it may be set aside by a direct application for that purpose to the Court of Queen's Bench: *Rex v. The Overseers of Bridgewater* (1). It is obviously a much more convenient course that the validity of the appointment should be brought into controversy in a direct way immediately upon the appointment, than that a party should lie by until a rate has been made and levied, and should then be allowed to revert back to some miscarriage in the appointment. No objection arising *in such a way ought to prevail, unless it rests on the most solid ground, which, in our judgment, the present objection does not.

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With respect to the alternative branch of the rule for a new trial, on the ground that the verdict was against evidence, we consider the case as being one peculiarly for the determination of the jury; and we should be very slow to grant a new trial in a case of imputed fraud, where the jury have negatived the fraud, especially in a

(1) Cowp. 139.

case where the plaintiff has declined the direct mode of questioning the appointment provided by the law for that purpose, and has himself selected a tribunal very inconvenient, if not oppressive, to the defendant.

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Upon these grounds we think the rule which has been obtained for a new trial should be discharged.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

JONES v. WAITE.

(5 Bing. N. C. 341—364; S. C. 7 Scott, 317; in H. L., see p. 717 below.)

1839.
Feb. 11.

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A deed of separation between plaintiff and his wife having been drawn up, but not executed by plaintiff: Held, that his executing such deed was a legal consideration for a promise by defendant to pay certain debts and expenses, for which plaintiff was solely liable.

THE plaintiff declared that, on the 19th of October, 1833, the defendant signed a certain memorandum in writing, whereby he agreed to and with the plaintiff, that the time mentioned in a certain deed of separation for the plaintiff's quitting a certain house at Holloway, should be extended to the 9th of December then next, inclusive; and also to pay the plaintiff the sum of 160*l.*, by eight half-yearly payments, towards Messrs. Horne and Gates's demand of 366*l.* 4*s.* 9*d.*, the said plaintiff taking the whole of such demand on himself; the payments to be made at the times of the payment of the annuity mentioned in the said deed of separation. And the defendant also agreed to pay 20*l.* towards liquidating certain outstanding debts at Rickmansworth, and also 220*l.* towards certain household expenses at Holloway, such last-mentioned sum of 220*l.* being divided into two payments, one half thereof payable at Michaelmas Day then next, and the other half at Lady Day at 1835. And by the said memorandum in writing, it was stated, that the defendant agreed to the above in consideration of the plaintiff's executing the deed of separation, and agreeing to pay Messrs. Horne and Gates, and the household expenses and Rickmansworth debts, in full. And the plaintiff averred, that he, confiding in the said agreement of the defendant, and in consequence thereof, was induced to, and did then execute, the said deed of separation in the said memorandum mentioned, that is to say, a certain deed of separation between the plaintiff and

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one Mary his wife, *and agreed to pay the said Messrs. Horne and Gates, in the said memorandum mentioned, their said demand of 366*l.* 4*s.* 9*d.*, and the said household expenses and Rickmansworth debts in full; and then took upon himself the payment of the said demands, debts, and expenses; whereof the defendant had notice: yet the defendant did not nor would perform the said agreement, but wholly neglected and refused (although often requested so to do), to make the first payment of the said sum of 220*l.*, so agreed to be paid by the defendant towards the household expenses at Holloway as aforesaid; which said first payment thereof, amounting to a certain sum of money, to wit, 110*l.*, under and by virtue of the said agreement or memorandum in writing, became due and payable, and ought to have been paid by the said defendant at Michaelmas Day, 1884, but the same still remained wholly due and unpaid; and the plaintiff by reason thereof was forced and obliged to pay, and was liable to pay the same out of his own monies: to the damage of the plaintiff of 120*l.*

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Plea, that at the time of the supposed signing by the defendant of the supposed memorandum in writing in the declaration mentioned, and before and at the time of the commencing of this suit, the plaintiff was solely liable to make to the said Messrs. Horne and Gates the payments, the supposed agreement by the plaintiff to make which, was by the said supposed memorandum in writing, stated to be in part the consideration for the defendant's agreeing, as was alleged to be in the said supposed memorandum in writing agreed by the defendant; and that the plaintiff was, at the said time of the supposed signing by the defendant of the said supposed memorandum in writing, and before and at the time of the commencing of this suit, solely liable to pay the said household expenses, and Rickmansworth debts, in full, the supposed agreement by the plaintiff *to pay which household expenses and Rickmansworth debts, in full, was, by the said supposed memorandum in writing, stated to be in part the consideration for the defendant agreeing, as was alleged to be in the said supposed memorandum in writing agreed by the defendant: and that, the defendant was ready to verify.

Special demurrer, on the ground that the plea was double. Joinder.

The case was first argued in the Court of Common Pleas in Easter Term, 1885, and judgment was given for the plaintiff: and upon error being brought in the Exchequer Chamber,

It was argued in Hilary Vacation, 1836 (4th of February), before Lord Denman, Ch. J., Lord Abinger, C. B., Littledale, J., Alderson, B., and Patteson J., by

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T. F. Ellis, for plaintiff in error (the defendant below). * * *

R. V. Richards, *contra*. * * *

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T. F. Ellis, in reply. * * *

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Cur. adv. vult.

PATTESON, J.:

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The objection to the plaintiff's recovering in this action, a sum of 110*l.* which the defendant had promised to pay him at Michaelmas, 1834, arises from the consideration for that promise. From the declaration and plea, it appears that the consideration consisted of two parts: first, the plaintiff's executing a deed of separation between himself and his wife, which had been already prepared; and, secondly, the plaintiff's taking upon himself certain payments to Messrs. Horne and Gates, and certain household expenses and debts, and agreeing to pay the same in full; but for which payments, expenses, and debts, the plaintiff was already solely liable. The second part of this consideration may be treated as wholly nugatory, as being merely an engagement by a man to pay his own debts, and the question turns entirely upon the first part: If that be illegal, the action must fail, because illegality of part of the consideration doubtless vitiates the whole contract.

Now it is conceded that a separation of husband and *wife may be in itself a legal act, and that any deed or agreement for carrying it into effect may be legal, provided it be for an actual and immediate, and not for a contingent or future separation. The terms of the deed of separation in the present case are not stated upon the record; but as illegality is not to be presumed, we must take it that the deed is in its provisions legal. It is however said, that it is illegal to give the husband money as an inducement to consent to such actual and immediate separation, and that an engagement to pay him part of certain debts for which he is solely liable, is tantamount to giving him money. The illegality of so doing is sought to be established by reference to the cases of *Hartley v. Rice* (1), *Allen v. Hearn* (2), and *Card v. Hope* (3). Those cases are perhaps distinguishable. In *Hartley v. Rice*, the agreement not to marry was

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(1) 10 R. R. 228 (10 East, 22).

(3) 26 R. R. 503 (2 B. & C. 661).

(2) 1 R. R. 149 (1 T. R. 56).

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held illegal in itself, quite independently of money being the inducement. *Allen v. Hearn* was a case of wager as to the election of members of Parliament, a matter which was held to be incapable of being the subject of any binding contract. *Carl v. Hope* turned upon the contract being a fraud upon the bye-laws of the East India Company. But admitting that the consent of the husband to a separation cannot legally be purchased, it by no means follows that part of the arrangement, in carrying into full effect a separation previously agreed upon, may not legally be that the husband should be indemnified in the whole or in part against certain debts contracted during the time that he and his wife were living together, and for which he is solely liable in point of law, in the same manner as it is unquestionably a legal part of such arrangements, that he should be indemnified against debts to be contracted afterwards, for which he might also become liable in point of law. On the contrary, I am of opinion that such indemnity is legal, and that the husband might legally make it the condition of his executing the deed of separation which had been prepared.

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The question, therefore, as it seems to me, is reduced to this: whether, upon the face of this record, it appears that the defendant promised to pay the plaintiff money in consideration of separating or agreeing to separate from his wife; in which case I think that the contract would be illegal: or that the defendant promised to pay the plaintiff money towards certain expenses already incurred whilst the plaintiff and his wife were living together, in consideration that the plaintiff would execute a deed of separation which had been already prepared. I think that the record shows the latter state of facts.

I agree with the learned counsel for the defendant, (plaintiff in error,) that the Court cannot conjecture any thing respecting the contents of the deed of separation, or import into the case any supposed facts for the purpose of showing the legality or illegality of the contract. I take the facts only as they appear on the record, and they are these: that by a deed of separation between the plaintiff and his wife, not yet executed by the plaintiff, he was to quit a house at Holloway on a certain day, and that some annuity was mentioned in that deed; that afterwards, by the written memorandum of agreement on which the plaintiff in this action declares, the time for quitting the house at Holloway was extended; that the plaintiff agreed to pay Messrs. Horne and Gates, the household expenses at Holloway, and the Rickmansworth debts in full; and

that, in consideration of his so agreeing, and of his executing the deed of separation, the defendant promised to pay him 160*l.* by eight half yearly payments towards the debt due to Horne and Gates, 20*l.* towards the Rickmansworth *debts, and 220*l.* by two payments, at Michaelmas, 1834, and Lady Day, 1835, towards the household expenses at Holloway.

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It is plain from these facts, that for some reason or other (and we are not to presume an illegal one), a separation between the plaintiff and his wife had been determined upon, the terms of which had been reduced into writing in the form of a deed; that the plaintiff for some reason or other had not yet executed that deed, and that he was induced to execute it by the defendant's promise, which is, in effect, a promise to indemnify the plaintiff against—among other things—a part of the bygone household expenses of the house at Holloway which the plaintiff was to quit.

I assume the deed of separation to be legal, because no illegality is shown; and I hold the consideration for the defendant's promise to be legal, because it is not that the husband would separate from his wife, but that he would complete the instruments and arrangements of a separation already determined upon.

For these reasons I am of opinion that the judgment of the Court below ought to be affirmed.

ALDERSON, B. :

I also am of opinion that the judgment of the Court of Common Pleas ought to be affirmed, and I shall state my reasons very shortly.

It is conceded that, if any part of the consideration for the promise of the defendant below be illegal, the judgment ought to be reversed; and it cannot be disputed that an engagement to pay a sum of money as an inducement for a future separation of a man from his wife would be contrary to law. But the difficulty is to point out upon these pleadings that this illegality is sufficiently alleged.

It appears clearly from the declaration, that a deed of separation had been prepared before the agreement *declared on, for the first statement in the agreement on which the plaintiff proceeds speaks of enlarging the time mentioned in such deed of separation; and it speaks also of the annuity mentioned in it, which may probably be taken to be an annuity to be paid by the plaintiff to his wife. The engagement of the defendant to pay the sums mentioned in his agreement is then stated to be on the consideration of the plaintiff's

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executing this deed of separation, and taking on himself the payment of certain debts.

All this is quite consistent with a previous separation already agreed on between the husband and wife; and there is nothing that I can see illegal after husband and wife have actually separated, upon certain terms mutually agreed between them, in a third person's undertaking to pay certain debts in order to induce the husband to execute a deed of separation, and thereby secure to the wife the advantages so stipulated for at the antecedent time when their actual separation took place.

If all this be consistent, and I think it is, with the facts stated on this record, there is nothing shown to be illegal in the consideration for the defendant's agreement. If there had been no previous separation, and it was in truth a bargain for a separation in future, the defendant should have stated that affirmatively in pleading. For illegality is not to be presumed; but, unless the contrary be expressly alleged upon the record, we ought to assume that the parties have acted in conformity to the law.

For these reasons I think that the judgment of the Court of Common Pleas ought to be affirmed.

LITLEDALE, J., concurred with PATTESON, J. and ALDERSON, B., in affirming the judgment of the Court below and upon the grounds stated by them.

[356] LORD ABINGER, C. B. :

In this case the declaration sets forth two considerations for the promise to pay a sum of money to the plaintiff: the first is, that the plaintiff should pay certain debts, and discharge certain expenses; the second, that he should execute a deed of separation from his wife.

The plea is applied to the first of these considerations only, and alleges that the debts were due from the plaintiff, and that he was bound to pay the expenses in question: upon the other consideration it is silent. To this plea there is a demurrer, upon which two questions arise; first, whether the payment of, or the promise to pay a debt to which the party promising is already liable by law, is a good consideration for a promise to him of money or other advantage; secondly, if it be not, whether the executing a deed of separation from his wife is a lawful consideration for a promise to pay money to the husband. If both these questions are to be

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answered in the negative, the plea is good, because it alleges a sufficient answer to the only consideration upon which the declaration can be sustained, and because there is no occasion to make any answer to the other part of the consideration which is illegal. Now a consideration to support a promise must either operate to the advantage of the party making the promise, or to the detriment of the party who is to perform the consideration. But a man is under a moral and legal obligation to pay his just debts. It cannot therefore be stated, as an abstract proposition, that he suffers any detriment from the discharge of that duty; and the declaration does not show in what way the defendant could have derived any advantage from the plaintiff paying his own debts. The plea therefore shows the insufficiency of that part of the consideration.

With regard to the other consideration to which the plea does not apply, it has been argued that as the law *will recognize the legality of deeds of separation, by allowing actions of covenant to be maintained upon them, it cannot be presumed that they are illegal, and that if they be not illegal, of course the execution of such a deed by the husband cannot be illegal. Now this proposition must at least receive this qualification, that the consideration which prevails on the husband to make such a deed be a good consideration in law to justify him in separating from his wife. There are certain circumstances which will induce the Ecclesiastical Court to pronounce a decree of divorce *à mensa et thoro*; and it may not be unlawful for a man, under the same circumstances, voluntarily to agree to do that which the law, if he refused, would compel him to do. Upon this ground a deed of separation made upon due consideration may well be considered as not unlawful. But the question is very different whether it be lawful in a husband to separate from his wife in consideration of a sum of money. It cannot be doubted that the separation between husband and wife without adequate cause is both against the law of God, and against the policy of every civilised society. The circumstances, therefore, which justify a separation, as they only justify an exception to a very important general rule, ought not to be presumed. But whether they might be presumed or not in support of a deed of separation already executed, it cannot be maintained that the receiving a sum of money by the husband is one of those circumstances, much less a circumstance which alone would justify a separation. The record in this case, when stripped of the superfluous matter which has been disposed of by the plea, presents nothing more than the naked

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fact of a separation by a husband from his wife in consideration of a sum of money.

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It is not necessary for the purpose of this investigation to review the cases which have been cited upon *this subject, it is enough to say that none of them has gone the length of deciding that a deed of separation reciting, as the only consideration of the husband's agreement to separate, the payment of money to him, would be a lawful deed. If such a deed would not be lawful, how can it be maintained that it would be lawful for the husband to accept money, or the promise of money, as the consideration for signing a deed of separation? In this case no other consideration appears, and the Court is not bound to presume any other in support of an agreement which is against the general rule of law, and can only be good by way of exception under special circumstances. But, in truth, pecuniary advantage to the husband ought to form no part, and can therefore form no legal part of a consideration for a separation from his wife. Either the circumstances are such as to make of themselves a good consideration for executing the deed, or they are not. If they are, the addition of money forms no part of the legal consideration; if they are not, the addition of money cannot make them so. Therefore, whether the Court be at liberty or not to presume in the absence of all suggestion upon the subject, that there might have been a lawful cause for the husband to separate from his wife, it is certain that the promise of money to be paid to him cannot have been a lawful inducement, whether it was the exclusive or the partial consideration upon which he agreed to execute a deed of separation.

The judgment, therefore, ought to be reversed.

LORD DENMAN, Ch. J.:

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This declaration states a promise to pay a sum of money to the plaintiff's use, in consideration of his taking upon himself certain debts and liabilities, and executing a deed of separation from his wife. The defendant pleaded that the debts were due from the plaintiff himself, and that he was already *liable to pay them; consequently that his undertaking to pay them could form no consideration for the defendant's promise. To this plea there was a demurrer, but it was admitted that the latter part of the consideration came to nothing, and that the sole consideration for the promise to pay money was the execution of a deed of separation. The declaration was therefore questioned on this ground.

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It was first urged in its support that, as some deeds of separation may be legal, this may be presumed legal, from the defendants having pleaded; and reference was made to the authority of *BAYLEY and HOLROYD, JJ.*, in *Hobson v. Middleton* (1), for the doctrine that, in any pleading where a fact is ambiguously stated, the adverse party by pleading over shall be taken to admit it in the most favourable sense of which it is capable. I apprehend, however, that this rule must be restricted to cases where the pleading over directly refers to such ambiguous matter, and answers it by introducing something new. But here the pleading over is confined to other facts, the statement of this part of the contract is not noticed in the plea, but remains with all its faults, and advantage may be taken of them by a writ of error. If however this rule could be applied to the present case, the most favourable sense for the plaintiff that can be assigned to his declaration is this, that an instrument providing for the separation of him and his wife had been prepared, under which an annuity was to be paid to the wife; and that, in consideration of his executing that instrument, the defendant undertook and promised to pay money for the plaintiff's use and benefit.

Some of the Judges of the Common Pleas appear to have thought that the declaration farther stated, that the plaintiff had previously entered into an agreement to execute the deed; and farther, that the annuity was to be paid by him: neither of these facts can I discover *on the record, though the latter is probable in fact. Perhaps they would not materially vary the question, for the result would equally be that the plaintiff, when free to execute or refuse to execute a deed of separation from his wife, had been induced to execute it by the promise of money. For breach of that promise the present action is brought; and the single question is raised, whether the execution of such a deed be a good consideration for a promise to pay money to the husband.

That deeds for the separation of married persons may be valid and effectual for certain purposes, many decisions have established: *Lister's case* (2) and *Mead's case* (3) show that they will be taken notice of by courts of law where separation has been rendered necessary for the wife's protection by cruelty and ill-usage on the husband's part; and even in equity, deeds securing a separate maintenance for the wife, which had been rendered necessary by the husband's misconduct, were upheld in the three cases of *Oxenden v. Oxenden*, *Nicholls v. Danvers*, and *Williams v. Callow*,

(1) 6 B. & C. 522.

(2) 8 Mod. 22.

(3) 1 Burr. 542.

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all reported in 2 Vernon. Most probably *Seeling v. Crawley*, in the same volume, proceeded on the same ground. Again, if a third person take upon himself the maintenance of the wife while separated from her husband, the husband has been held compellable to pay the sum which, on that consideration, he bound himself to pay to the trustee: *Gawden v. Draper* (1); and a husband's release to such a trustee, on the same consideration, of his remainder in an estate, was held by Sir WILLIAM GRANT to be good, even against the assignees of that husband when a bankrupt: *Worrall v. Jacob* (2).

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That the husband himself may derive protection *against debts incurred by his wife while living apart from him, by showing that he had agreed with a trustee to provide adequate funds for her maintenance, and had, in fact, provided them, is clearly established by several cases, particularly by that of *Nurse v. Craig* (3),—a decision unanimous on that point,—though Sir JAMES MANSFIELD differed from the opinion that it was necessary for the husband to pay the money agreed for. Yet, the assertion that deeds of separation are at variance with the policy of the law, has been often made by the highest authorities, and never disputed by any. Many of the Judges who have given effect to them, for any purpose, have expressly declared that they adopted them to that extent with reluctance, and would have paused if the question had been new: Lord ROSSLYN, in *Legard v. Johnson* (4), Lord ELDON, in *Beard v. Webb* (5), and in *St. John v. St. John* (6).

Sir W. GRANT pointedly declares it to be now settled that “the Court of Chancery will not carry into effect articles of separation between husband and wife. It recognizes no powers to vary the rights and duties growing out of the marriage contract, or to effect at their pleasure a partial dissolution of that contract.” And in establishing the husband's conveyance of property, in consideration of the trustees undertaking to indemnify him against the wife's debts, he adds, “it does seem rather strange that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law.” But the validity of the principal agreement is now in question before us: if it is not valid and binding, the husband's execution of it

(1) 2 Ventr. 217.

(2) 3 Mer. 268.

(3) 9 R. R. 625 (2 Bos. & P. (N. R.)
148).

(4) 3 Ves. 358.

(5) 2 Bos. & P. 93.

(6) 11 Ves. 526.

cannot be a good consideration for a third party's promise to pay him money.

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There appears to be a strange inconsistency in pronouncing a deed to be valid, and admitting at the same time that it cannot be enforced, or in contending that it might be the foundation of a suit at law, while it notoriously supplies no ground for a specific performance, because equity regards it as contrary to public policy. But beyond that objection, in point of principle, the legal relation of the parties creates great difficulties; and the question may be again asked, as it was by Lord ELDON in several cases, on whom can the contract be binding? Not on the wife, for she cannot contract with her husband, or execute a deed. Not on the husband, unless a third party may sue him for a breach of covenant in performing the duties of a husband towards his wife. Reverse the present case, and suppose that the husband had accepted the money on a promise to execute the deed, and been sued for a breach of promise, could an action for damages have been maintained? If not, it seems to follow that the execution of a similar deed cannot form the legal consideration for a promise to pay money.

I am aware of the case of *Lord Rodney v. Chambers* (1), which determines that an action will lie against a husband having executed a deed of separation, for the sum which he contracts to pay to trustees in case of a future separation, subject to their approval. But this decision has received some severe shocks from the strictures of Lord ELDON in *St. John v. St. John*, and must be considered as directly overturned by the King's Bench in *Hindley v. Lord Westmeath*, though it is difficult to explain why a present separation is less contrary to public policy than the agreement to give effect to one, if rendered necessary by circumstances, at a future time.

I am also aware of the case of *Jee v. Thurlow* (2), where the Court of K. B. sustained a covenant made by a husband to pay an annuity to the wife's trustees under a deed of separation. Lord TENTERDEN, Ch. J. and BAYLEY, J. certainly thought themselves bound by decisions which have, to a certain extent, recognised such deeds: but the other two Judges were cautious in their expressions; and the opinion of HOLROYD, J. is remarkable, in looking to the trustees' covenant to indemnify as the basis of the husband's obligation: indeed, their covenant being, as he particularly remarks, not limited to the period of separation.

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I have also carefully examined the numerous cases cited in

(1) 2 East, 283.

(2) 26 R. R. 453 (2 B. & C. 547).

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Mr. Jacob's edition of Roper's Law of Husband and Wife, and the able commentary upon them. Some of them were avowedly, and doubtless more of them actually, brought before courts of equity, by consent, for the purpose of obtaining directions on the effect of similar deeds without disputing their legality. Some of them I take to be undoubtedly erroneous, such as *Hoare v. Hoare* (1), decided in the House of Lords, where the stipulation of a marriage settlement for the contingency of the parties separating was upheld. If I could venture to lay down the principle which alone seems to be safely deducible from all these cases, it is this; that when a husband has by his deed acknowledged his wife to have a just cause of separation from him, and has covenanted with her natural friends to allow her a maintenance during separation, on being relieved from liability to her debts, he shall not be allowed to impeach the validity of that covenant.

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But even if the most questionable of these cases were good law, and deeds of separation binding for every purpose both at law and in equity, all former decisions *fall infinitely short of the present, where a promise to pay the husband a sum of money is a consideration for his executing the deed. This alone it is that substantially appears on the present record. Generally speaking, the lawfulness of a thing promised does not make it lawful to promise to do it for a money consideration. It is lawful to vote for a candidate at an election, but bribery to give or promise the voter money for so doing.

The same principle was illustrated by numerous authorities cited at the Bar, and in the case of married persons contracting for their separation, which I take to be at least *primâ facie* illegal, where no circumstances by which it is legalised are set forth, and no justifiable motive is assigned, it appears to me to be a dangerous novelty to permit the abdication of conjugal rights, and the abandonment of marital duties, to be made the subject of money stipulation.

It is satisfactory, as well as proper, to add, that the purchase of a husband's consent to separation is admitted to be illegal, and this promise is held binding only as it may be a part of the negotiation which leads to a separation that may possibly be legal. But I am unable to distinguish the two cases, and I think the latter contract neither more nor less than an indirect mode of securing effect to the former.

Judgment affirmed.

IN THE HOUSE OF LORDS.

JONES *v.* WAITE.1842.
July 1.(9 Clark & Finnely, 88—110; S. C. 4 Man. & Gr. 110; 5 Scott, N. R. 951;
6 Jur. 653.)

[The judgment of the Exchequer Chamber having been brought up on appeal to the House of Lords, and argued,]

LORD BROUGHAM :

[9 Cl. & Fin.
109]

I collect from the learned Judges that they do not consider there was any illegality disclosed by the agreement; there is no averment on the record to show it was illegal.

TINDAL, Ch. J. :

My brothers and myself are of opinion that there is no illegality disclosed by this agreement. One part of the consideration for it is the execution of the deed of separation, which, as clearly appears from the declaration, was previously agreed upon and drawn up. The second part of the consideration is the payment towards the discharge *of the demand of Messrs. Horne and Gates; there is no ground for supposing illegality in that; and the question therefore comes to this,—was the deed of separation which the party agreed to execute illegal? We are bound to say that in the way in which it is presented to us on the record, there is no illegality shown.

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LORD CAMPBELL :

We are not to know here what the deed of separation was, further than as it appears by the record; and on the record no illegality is disclosed.

LORD BROUGHAM :

I agree with the learned Judges that nothing is disclosed on the face of the pleadings to show the agreement to be illegal. I think the judgment must be affirmed, and with costs.

It was ordered accordingly, that the judgment of the Court of Exchequer Chamber be

Affirmed, with costs.

WARD *v.* SUFFIELD.

1839.
 April 20.
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(5 Bing. N. C. 381—385; S. C. 7 Scott, 352; 2 Arn. 4; 8 L. J. (N. S.) C. P. 207.)

Defendant, as surety for N., having received and promised to pay an account which he was informed had been agreed to by N., and refusing to produce it on the trial of an action brought against him by plaintiff, the employer of N.: Held, that without calling N., plaintiff might prove by the witness who produced a duplicate, that that was the account N. had gone over, and that he had said it was correct.

THE declaration stated that the plaintiff was about to employ an agent for the sale of turpentine and certain other property, and that in consideration the plaintiff would employ one Henry New as his agent to collect his debts, the defendant undertook and promised the plaintiff to be responsible to him for all sums of money which New might receive as the plaintiff's agent, not exceeding the sum of 250*l.* Breach, that New did not pay over what he had received.

The defendant pleaded, first, *non assumpsit*; secondly, that New, during his employment as agent, had not received as such agent the money which the declaration alleged him to have received on account of the plaintiff; and, thirdly, that New did account *modo et formâ*.

At the trial, after the defendant's signature to the guaranty had been proved, and that a Mr. Bradley was also a surety for New, the plaintiff gave in evidence the following letter from his attorney to the defendant:

"On the other side you have accounts between Ward and New, as agreed to by the latter, by which a balance of 183*l.* 9*s.* 2*d.* is due to Mr. Ward, with some slight deductions for postage, &c. November 8, 1837."

The defendant's answer was,

"In reply to yours of this morning, I have to inform you that I have sent by this evening's post to Bradley for his share, which, when I have received, I will remit, with mine, to Mr. Ward."

The defendant declining to produce the account sent to him, a witness named Lang then proved that he and *New together had gone over an account, and that New admitted it was correct.

Another witness identified the account which New had gone over as a duplicate of that sent to the defendant.

On the part of the defendant it was objected, that New being alive, the declaration made by him to Lang was not admissible in evidence. New himself ought to have been called.

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GURNEY, B., however, before whom the cause was tried, admitted the testimony of Lang, and left it to the jury to say, whether the paper produced by him was the account agreed to by New. A verdict was found for the plaintiff, which

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R. V. Richards moved to set aside, on the ground that the evidence of New's declaration ought to have been rejected. In *Goss v. Watlington* (1) and *Whitnash v. Gifford* (2), where similar evidence was received, the party making the declaration was dead; and though, without New's declaration, the plaintiff here might have succeeded on the defendant's letter, yet as the Court could not ascertain what portion of the proof it was that determined the minds of the jury, they would grant a new trial if any were improperly received: *Crease v. Barrett* (3). In *Doe d. Teynham v. Tyler* (4), the rule as to the discretion of the Court on this head was laid down too broadly.

A rule *nisi* having been granted,

Talfourd, Serjt. showed cause:

The evidence was admissible, because there was an express issue on New's accounting; and his declaration *accompanying the act of accounting was evidence in support of that issue.

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At all events, the admission of the evidence was immaterial, for the plaintiff's case was complete without it, and though, according to *Crease v. Barrett*, the rejection of proper evidence, however slight, may be a ground for a new trial, because without it the party may say his case is not complete, yet the admission of superfluous evidence ought not to impeach a verdict which may be maintained without it.

R. V. Richards, in support of the rule:

In *De Rutzen v. Farr* (5) and *Wright v. Tatham* (6) the evidence objected to was superfluous, and the verdict might have been maintained without it; but as it is impossible to ascertain what portion of the evidence it is that weighs most with the jury, the COURT held that the only question was, whether the evidence was properly or improperly admitted. Here, however, it was important

(1) 3 Brod. & B. 132.

(2) 8 B. & C. 556.

(3) 40 R. R. 779 (1 Cr. M. & R. 919).

(4) 31 R. R. 496 (6 Bing. 561).

(5) 4 Ad. & El. 53.

(6) 4 Bing. N. C. 489.

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to the defendant that New should have been called to explain the particulars of the account.

TINDAL, Ch. J. :

I think this rule may be discharged, without breaking in on any principle of law laid down in *Crease v. Barrett*. Looking at the purpose for which the evidence in question was adduced, I think it stands clear of the rule laid down in that decision.

It is true, that when the principal debtor is alive, his declarations are not evidence against his surety; but the account which New had examined and assented to as a correct statement of the account between him and the plaintiff, was, under the circumstances of this case, evidence against the defendant, and the object of calling Lang was only to identify that account.

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On the 8th of November the defendant receives a letter apprising him that it contains the account between Ward and New, as agreed to by the latter, showing a balance of 183*l.* 9*s.* 2*d.* due to Ward. The defendant answers, that he will apply to his co-surety for his share, and remit it, together with his own, to Ward. This is an admission by the defendant that the account agreed to by New was fairly stated as between him and the plaintiff. It then became necessary for the plaintiff to show what was the account agreed to by New. Upon which Lang is called to produce an account which he proves was agreed to by New, and another clerk, proves that a duplicate of that account was the account sent to the defendant.

I think, therefore, that the testimony of Lang was properly received, and that this rule ought to be discharged.

BOSANQUET, J. :

I am also of opinion that this evidence was properly received.

The defendant, by his letter of the 8th of November, admits that he is liable to the account agreed to by New, and Lang is called, not to prove declarations made by New, but that, in point of fact, this was the account agreed to by him.

COLTMAN, J. :

I think Lang was competent to show that the paper he produced was a copy of that sent to the defendant; but I doubt whether he could be allowed to state that New agreed to that paper.

ERSKINE, J. :

I am of opinion the evidence was properly received. The

defendant having declined to produce the account sent to him, the correctness of which, as agreed to by New, he had admitted in his letter of the 8th of November, secondary evidence of the account was produced by Lang. If the testimony of *Lang had been left to the jury, as proving the amount agreed to by New, I should have thought there might have been ground for a new trial; but the question was, whether the account produced by him was that which the defendant admitted New had agreed to.

I think the rule should be

Discharged.

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LAWRENCE AND ANOTHER, ASSIGNEES OF W. OKILL,
A BANKRUPT, v. KNOWLES.

(5 Bing. N. C. 399—410; S. C. 7 Scott, 381; 2 Arn. 43; 8 L. J. (N.S.) C. P. 210.)

1839.
April 23.

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1. In an action by plaintiffs as assignees of O., a bankrupt, against defendant, for non-performance of a contract, the issue raised was, whether O. and plaintiffs, as his assignees, had been always ready and willing to perform it: Held, that the bankruptcy and insolvency of O., and the insufficiency of his assets, were circumstances from which the jury might properly infer that he and his assignees had not been ready and willing.

2. The contract was to be performed on the 1st of July, 1835; and another issue was, whether plaintiffs had abandoned it: Held, that they were bound to make their election within a reasonable time, and that, as they had taken no decisive step till January, 1838, the jury might properly infer that they had abandoned the contract.

THE declaration contained two counts: the first, on a contract dated the 12th of June, 1833, by which Okill agreed to purchase from the defendant sixty shares in the Grand Junction Railway, at 14*l.* 5*s.* per share, net payment, as follows, to wit, 155*l.* on the 15th of June, 1833, and the remainder on the 29th June; and in consideration thereof, and that Okill promised to accept the shares and pay for the same, the defendant promised Okill, before his bankruptcy, to deliver and transfer the shares upon request: the count then averred that Okill, on the 15th of June, paid the defendant 155*l.* in part; and afterwards and before the bankruptcy, and after the 29th of June, to wit, on the 6th of July, 1833, and on divers other times, between that day and the 1st of January, 1835, paid the defendant divers other sums of money, amounting to 585*l.* in part payment, &c., which the defendant accepted, and waived the payment of the remainder on the 29th of June, 1833: that although the defendant delivered thirty-five shares, and Okill, before his bankruptcy, and the plaintiffs as his assignees, after

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his bankruptcy, were always ready and willing to pay the remainder of the price, together with all calls made in respect of the shares, and the plaintiffs as assignees afterwards, and after the bankruptcy, to wit, on the 11th of January, *1838, tendered the residue, together with the amount paid for calls, &c. ; yet the defendant did not deliver the shares.

The second count was on a contract, dated the 1st of July, 1834, for the sale by the defendant to Okill of fifty shares in the same railway, at 10*l.* premium ; and in consideration that Okill would buy and would accept the same on the 1st of July, 1835, and would allow the defendant interest upon such calls as were paid before that time, the defendant promised Okill to deliver him the shares on the 1st of July, 1835. The count then stated the bankruptcy of Okill on the 3rd of February, 1835 ; and that the plaintiffs, as his assignees, were always, on and after the 1st of July, 1835, ready and willing to pay the defendant for the shares after the rate aforesaid, with interest upon calls paid from the 1st of July, 1834 ; and afterwards, to wit, on the 11th of January, 1838, tendered the moneys due ; but that the defendant would not deliver the shares. There was also a count for money had and received by the defendant to the use of the plaintiffs as assignees, and for money due on an account stated between the assignees and the defendant.

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The defendant pleaded, 1st, *non assumpsit* to the whole declaration. 2nd, To the first count, a traverse of the payment by Okill, and of the acceptance and receipt of the several sums in the first count mentioned in part payment, and of the waiver of payment of the remainder on the 29th of June, *modo et formâ*. 3rd, To the first count, traverse of the allegation, that Okill before his bankruptcy, and the plaintiffs as his assignees afterwards, were ready and willing to pay the remainder of the price, together with all sums paid for calls, *modo et formâ*. 4th, To the first count, that the alleged tender in the first count mentioned was made at an unreasonable time after the alleged waiver ; and that *Okill, or the plaintiffs, within a reasonable time after the alleged waiver, were not ready and willing to pay the remainder of the price, and did not tender it within a reasonable time after the waiver, or after the 29th of June, 1833. Verification. 5th, To the first count, that after making the promises in the first count mentioned, and payment and delivery of the shares in part performance, and waiver by the defendant of the remainder of the price, and before the bankruptcy, mutual promises were made by Okill and the

defendant not to require further performance, and a mutual agreement thereupon to abandon the contract. Verification. 6th, To the first count, that the plaintiffs, as assignees, did not, at the bankruptcy, or for a long time, to wit, six months, or in any reasonable time after the bankruptcy, adopt the contract, but declined so to do; with averment of mutual promises between the plaintiffs and the defendant, dispensing each other from further performance, as in the last plea. Verification.

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7th, To the second count, traverse of the allegation that the plaintiffs, as assignees, were ready and willing to pay the defendant for the shares, as in the second count mentioned, and made the tender in that count mentioned, or requested the defendant to deliver the shares. 8th, To the second count, that the alleged tender was made at an unreasonable time, and at a time unreasonably long after the 1st of July, 1835. Averment, that neither the plaintiffs nor any other persons were, within a reasonable time after the 1st July, 1835, ready and willing to pay, nor did they tender within a reasonable time after that day. Verification. 9th, To the second count (as in the sixth plea), that the plaintiffs, as assignees, did not adopt the contract within a reasonable time after the bankruptcy: with averment of mutual abandonment. Verification. 10th, To the second count, that after the *thirty-five shares had been delivered to the plaintiffs, whilst 115*l.* was due to the defendant, and before the bankruptcy, &c., to wit, on the 17th of January, 1834, the defendant agreed to give Okill further time, until the acceptance hereinafter mentioned should become due; that he would lend Okill a further sum, to wit, 285*l.*; that Okill should give the defendant his acceptance for 400*l.*; that the defendant should hold the remainder of the said shares until Okill's acceptance should become due; and, if the acceptance were not paid, the defendant should be at liberty to sell them: averment, that the defendant did give further time, and lend 285*l.*, and that Okill gave his acceptance for 400*l.*, and made default; and thereupon the defendant sold the remainder of the shares, according to the agreement. Verification.

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The particular of demand claimed 2,188*l.* 15*s.* 11*d.*, the value of the shares in the first count mentioned, which the defendant refused to deliver, over and above the price paid by Okill for the same; and 5,651*l.* 15*s.* 4*d.*, the value of the shares in the second count mentioned, over and above the money agreed to be paid for the same.

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At the trial it appeared that, on the 12th of June, 1833, the defendant sold Okill sixty Grand Junction Railway shares, at 14*l.* 5*s.* per share, 155*l.* to be paid on the following Saturday, and the remainder on the 29th of June, 1833.

On the 1st of July, 1834, the defendant sold Okill fifty Grand Junction Railway shares, at 10*l.* premium each, to be delivered on the 1st of July, 1835, Okill allowing the defendant interest on such calls as should be paid in the interim.

The sixty shares in the first contract were not paid for by Okill on the 29th of June, 1833, according to the stipulation; and it being inconvenient for him to pay, the defendant granted him several extensions of time. *On the 29th of August, 1833, having received from Okill the sum of 275*l.*, he delivered thirty-five of the shares to him, or his order, and agreed to give him time until the January following, for the payment of the balance on the remaining twenty-five. When January came, Okill could not meet the balance of 115*l.* and interest; and the defendant then agreed to lend him 285*l.*, and to give him until the month of January, 1835, to make good the balance due on the twenty-five shares, Okill giving his acceptance at twelve months' date for 400*l.*, the aggregate of the two sums of 115*l.* and 285*l.* Okill made default in payment of this bill, and in about a month afterwards became bankrupt. The fiat was issued on the 3rd of February, 1835, and the plaintiffs were chosen assignees on the 23rd. The bankrupt obtained his certificate on the 22nd of May following; but for several months in the spring of that year was confined for debt in Lancaster Castle, and within the proper time after commitment gave notice of his intention to apply for his discharge under the Insolvent Debtors' Act.

On the second contract, in which the shares were not deliverable until the 1st of July, 1835, five months after the bankruptcy, no tender of the price was made to the defendant, nor was any notice given to him by the plaintiffs that they were ready to perform the contract on their parts, and should require performance on his, except as hereafter mentioned.

In July and September, 1835, the bankrupt called on the defendant on the subject of this contract: the defendant said shares would be lower, but refused to have any thing to do with the bankrupt.

Nine or ten calls were made by the Company between the time of the contracts and the tender by the plaintiffs hereafter mentioned, and no provision was made for such calls either by the

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bankrupt or his assignees, although *by the Railway Act all shares are declared subject to forfeiture if the calls are not paid within a limited time.

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In the month of October, 1835, the premium on Grand Junction shares having advanced to 50*l.* per share, and the assignees threatening an action, the defendant met them at the office of their attorneys and made a conditional offer, which was not accepted.

In February, 1837, the plaintiffs' attorneys wrote to the defendant's attorney, requesting him to admit that the purchase-money, with interest upon the two contracts, had been tendered to the defendant; but his attorney declined to enter into the admission.

In January, 1838, the demand was renewed by the following letter from the plaintiffs' attorneys: "We are again requested by the assignees of W. Okill, a bankrupt, to write to you for the twenty-five shares, being the residue of the sixty shares, in the Grand Junction Railway Company, sold by you to the bankrupt on the 12th of June, 1833, and remaining yet undelivered, and also for fifty other shares in the said railway sold by you to the bankrupt on the 1st of July, 1834. And we beg to state, that the assignees are ready to pay you the balance owing to you for same, with interest. Should it still be your intention to resist this demand, we will thank you to give us the name of the solicitor whom you intend to employ."

This was followed by a tender of 2,771*l.* 4*s.* 1*d.* as the amount due for premium, calls, and interest on the twenty-five shares; and 5,748*l.* 4*s.* 8*d.*, as due in like manner for the fifty shares.

The bankrupt's estate had produced no assets sufficient to cover any such payments.

COLERIDGE, J., before whom the cause was tried, left it to the jury to say whether they would not, from the *conduct of the parties and the length of time which had elapsed, infer an abandonment of the contract, although there was no direct evidence to that point.

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A verdict having been found for the defendant,

Cresswell obtained a rule *nisi* for a new trial on the ground of misdirection, and that the verdict was against the evidence; and to enter up judgment *non obstante veredicto* for the plaintiffs on the issues raised by the fourth and eighth pleas, that the tender on the part of the plaintiffs was not made within a reasonable

LAWRENCE time; contending, that on a contract, such as the present, the
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Wilde, Serjt., R. Alexander, Crompton, and Knowles, who showed cause, argued this point at length, citing Sugd. V. P. 341, 6th ed., *Doloret v. Rothschild* (1), *Rothschild v. Hennings* (2), and *Ellis v. Thompson* (3); but the decision of the Court turned on the single question whether, under the circumstances above stated, the plaintiffs had failed to establish that they, as assignees, and Okill, before his bankruptcy, had, as they averred in the declaration, been always ready and willing to perform the contract.

For the defendant it was contended, that as Okill from his insolvency was incapable of performing the contract, it was impossible to contend that he was ready and willing; and with respect to the assignees, as they did not adopt the contract within a reasonable time after the bankruptcy, and had no assets wherewith they could have paid for the shares, it followed equally that they were not ready to complete, but must be taken to have abandoned it.

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It was for the plaintiffs to establish that they were ready and willing to pay; as a vendor of a lease which can only be assigned with consent of the lessor must show that he has obtained such consent: *Mason v. Corder* (4). Where a party, by his conduct, abandons a contract even without intending to do so, he cannot afterwards enforce it; and what amounts to a waiver is a question for the jury: *Gomery v. Bond* (5).

Cresswell and Wightman, in support of the rule, contended that general insolvency is no proof of the insolvent's inability to pay a particular sum, which his friends, on an emergency, might possibly advance for him. It did not follow, therefore, from Okill's insolvency, that he was not ready, when called upon, to pay the price of these shares: at all events, upon a contract like the present, where the defendant had to deliver the article purchased of him, the *onus* lay on him to show that he offered to deliver it, and that at the time he made the offer the plaintiff was not ready to pay: it is more convenient for the defendant to fix on and prove a particular time when the plaintiff was not ready, than for the plaintiff to prove that he has been always ready; and it did not

(1) 24 R. R. 243 (1 Sim. & St. 590).

(2) 9 B. & C. 470.

(3) 49 R. R. 679 (3 M. & W. 445).

(4) 17 R. R. 427 (7 Taunt. 9).

(5) 3 M. & S. 378.

appear that Okill was ever called upon to fulfil the contract. In similar cases, for instance in an action for a breach of promise of marriage, if the defendant pleads that the plaintiff was not ready and willing, he must show a particular time when the plaintiff was called upon and refused.

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As to the supposed waiver, or abandonment of the contract, an express act may constitute an abandonment, as in *Gomery v. Bond*; but omitting to proceed is not equivalent to an express act of waiver. If the price had been paid, the shares remaining in the hands of the vendor, *he could not afterwards refuse to deliver them on the ground that the purchaser had not demanded them within a reasonable time.

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At all events the plaintiffs were entitled to a verdict on the count for money had and received, for 240*l.*, being such portion of the money paid to the defendant as exceeded the price of the shares actually handed over.

TINDAL, Ch. J.:

This rule may be decided on a ground not so wide as that on which it has been argued.

If there be any pleas which go to the whole cause of action in the first and second counts, we cannot send the cause down to a new trial.

And it appears to me that the third plea, which is pleaded to the first count, and the ninth plea, which is pleaded to the second, go to the whole cause of action in those counts respectively, and have been properly found by the jury.

The declaration states that Okill purchased certain railway shares of the defendant, to be delivered on a subsequent day; that Okill paid a portion of the price, and that he, before his bankruptcy, and his assignees afterwards, were always ready and willing to pay the residue, and the amount of any calls made upon the shares. A distinct issue is raised on that averment; an averment which the plaintiffs were compelled to make; for if the defendant had paid calls upon the shares in the interval between the sale and the time for delivery, he would have had a lien on them to the extent of the money paid.

Now the evidence adduced under that issue shows clearly that Okill was not always ready and willing to pay for the shares; for in January, 1834, not having the money he had agreed to pay, he borrowed 285*l.* on the credit of his bill; and when that became

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due in 1835, was unable to take it up: therefore, he was not always *ready to pay, and the third plea has been established in evidence. It becomes unnecessary therefore to consider the fourth and subsequent pleas to the first count.

The ninth plea, which is addressed to the second count, alleges that the plaintiffs, as assignees of Okill, did not adopt the contract, but that they and the defendant mutually agreed to abandon it. The question, therefore, on that plea is, was there sufficient evidence to justify the jury in finding that issue in favour of the defendant?

Now, the contract was to be performed on the 1st of July, 1835. In February, 1835, Okill became a bankrupt, and his assignees were bound in a reasonable time after the 1st of July, at the latest, to declare whether they meant to take to the contract or not. Even in the case of a lease, where the legal estate is vested in the assignees, the statute 6 Geo. IV. c. 16, s. 75 (1), having declared, that if the assignees accept a lease belonging to the bankrupt, he shall no longer be liable to the performance of the covenants, a case in 1 Rose (2) has decided that the assignees ought to make their election within ten or twelve days. Without saying whether the assignees, here, ought to have made their election within ten or twelve days, there was sufficient to justify the jury in finding that the contract had been abandoned. From July, 1835, till October following no steps were taken, and then, nothing more than a conditional proposal, which the plaintiffs refused to accept. From October, 1835, till February, 1837, the assignees were silent, and then only inquired whether the defendant would make an admission as to a bygone tender. The next step was not taken till January, 1838, when the action was commenced.

There was enough in these circumstances to justify the jury in finding that the contract was abandoned, and therefore the cause ought not to go down again.

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As to the 240*l.* in the hands of the defendant, we *cannot now be called upon to enter into the question. It was not mentioned in the plaintiffs' particular, nor when the motion was made for a new trial. The rule must be discharged.

BOSANQUET, J. :

I am of the same opinion. The question is, whether the verdict

(1) See now s. 55 of the Bankruptcy Act, 1890.—R. C.
 Act, 1883 (46 & 47 Vict. c. 52), as extended by s. 13 of the Bankruptcy

(2) *Ex parte Scott*, 1 Rose, 446, n.

is warranted on the third and ninth pleas? The issue raised on the third is as to the readiness of Okill and his assignees to pay the sum agreed upon for the shares.

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On behalf of the plaintiffs it has been argued that the defendant should establish a refusal by them on a particular occasion. That may be so in some cases, where the party liable to pay is solvent; but I cannot conceive any circumstance more indicative of want of readiness than incapacity: here, we have abundant proof that Okill was incapable of paying before his bankruptcy, and the assignees, from the state of his assets, afterwards.

Then, on the ninth plea, was there enough shown to satisfy the jury that the contract had been abandoned? It is clear that a parol contract may be discharged by parol, and even words are not necessary in all cases, for the conduct of the parties may sufficiently show their intentions. Here, the bankrupt entered into extensive engagements, which he was incapable of fulfilling: his assignees might elect to adopt them, but their election ought to be declared within a reasonable time; and upon a contract which ought to have been completed in July, 1835, it is most unreasonable that assignees should hold their right of election in suspense till January, 1838.

There is no reason, therefore, for disturbing the verdict; and as for the 240*l.*, according to their particular the plaintiffs sought only to recover the value of the shares over and above what had been paid.

COLTMAN, J. :

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The third plea traverses a material allegation in the declaration, on which issue is expressly taken; and it is said, on the part of the plaintiffs, that the defendant cannot establish this plea without showing an offer of the shares, and a refusal of the price by the plaintiffs; the refusal, however, as in other cases, may be inferred from circumstances, and there are enough here to justify the verdict.

I think, also, that the ninth plea has been equally established. There is evidence sufficient to show that the assignees abandoned the contract; for even if they had the wish, it does not appear that they had the means to fulfil it; and they held their hand for two or three years, which they had no right to do.

As to the 240*l.*, the claim was not made in the particular, or on the motion for a rule *nisi*.

SAUNDERSON to on those occasions by the drawers and the defendants as a bill
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It was also proved, that the usual course of business among extensive bill brokers in the city of London, is, to examine the bills discounted by them, by the figures and the stamp, not by reading the body of the bill, as it would be almost impossible, from the number of bills discounted daily, to take them by any thing but the figures and stamps.

On the 14th of January, 1837, the plaintiffs discounted the bill for Maltby & Co., and the plaintiffs paid them 245*l*., less the discount for the same. Before the bill arrived at maturity, Maltby & Co. failed.

The defendants upon the trial objected to the admissibility of the evidence of the facts relating to the transaction in respect of which the bill was drawn, of the intention of the parties, of the circumstances relating to the applications for the acceptance, and of the defendant's conduct in regard to them: but the evidence was received, subject to the opinion of the Court upon the admissibility of the whole or any part of the same.

The question for the opinion of the Court was, whether, upon such of the evidence given at the trial as might be deemed to be admissible, the plaintiffs were entitled to recover in this action, either the sum of 245*l*. and interest, or the sum of 200*l*. and interest. If the Court should be of opinion that the plaintiffs *were entitled to recover either of those sums, a verdict was to be entered accordingly. If the Court should be of opinion that the plaintiffs were not entitled to recover any sum from the defendants, a nonsuit was to be entered.

Wilde, Serjt. for the plaintiffs:

The amount of the stamp, the value of the goods for which the bill was accepted, and the conduct of the acceptors shows clearly that it was their intention to accept a bill for 245*l*.; and the bill being drawn for value received, the plaintiffs only explain, and do not contradict or vary the instrument, by showing what the amount of that value was. It has always been the practice so to explain mercantile instruments. Thus in *Rex v. Elliott* (1), where the prisoner was indicted for forging a 50*l*. promissory note, the body of the note omitted the word "pounds:" but the margin, containing the figures 50*l*., it was held that the prisoner was

(1) 2 East, Pl. Cr. 951.

properly convicted. Marius lays it down, p. 32, 3rd edit., "If it so fall out, that through unadvisedness, or error of the pen, the figures of the sum, and the words at length of the sum that is to be paid upon any bill of exchange do not agree together, either that the figures do mention more and the words less, or that the figures do specify less, and the words at length more, in either, or in any such like case, you ought to observe and follow the order of the words mentioned at length, and not in figures, until further order be had concerning the same, because a man is more apt to commit an error with his pen in writing a figure, than he is in writing a word: and also because the figures at the top of the bill do only, as it were, serve as the contents of the bill, and a breviat thereof, but the words at length are in the body of the *bill of exchange, and are the chief and principal substance thereof, whereunto special regard ought to be had." He is followed by Beawes, *Lex Merc.* 441, pl. 193, nearly in the same words, and Forbes, in his work on Bills of Exchange, extracts the passage, omitting the qualification. The qualification, however, implies that the drawee may wait for and receive information as to what was the real intention of the parties; and the whole passage applies rather to bills drawn on a general account of the details of which the drawee may be ignorant, than to bills drawn to obtain payment on a specific contract. Then, every contract must be taken *fortius contra proferentem*; and there exists here in the amount of the stamp an indication of intention which could not be found in the time of Marius. The rule which precludes the receipt of evidence to explain a patent ambiguity, does not apply to mercantile contracts, which are often framed in characters partaking of the nature of hieroglyphics, or expressed in language which conveys no meaning to an ordinary reader, and, therefore, from the necessity of the case, must be explained by parol evidence. Thus, in *Smith v. Wilson* (1), evidence was admitted to show that by the expression 1,000 rabbits, the parties meant 1,200. In *Bold v. Rayner* (2) a variance between the bought and sold note was explained by the usage of trade. See also *Bottomley v. Forbes* (3). And where a question arises as to the general intention of the parties, concerning which the instrument is not decisive, it has been held that proof of independent facts, collateral to the instrument, may be properly admitted: *Rex v. Laindon* (4). Here, as the bill purports to be for value received, the plaintiff may show,

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(1) 37 E. R. 536 (3 B. & Ad. 728).

(3) P. 629, *ante* (5 Bing. N. C. 121).

(2) 46 E. R. 322 (1 M. & W. 343).

(4) 8 T. R. 379.

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as a collateral fact, what that value was, and then *the intention of the acceptors may be collected from the figures they have used. As in *Fonnereau v. Poyntz* (1), where a certain amount of stock was bequeathed, evidence was admitted to show that the testator meant the amount of money which could be raised by the stock, and not the amount of the stock itself. In *Beaumont v. Fell* (2), in explanation of a bequest to Catherine Earnley, evidence was admitted that the testator meant Gertrude Yardley. In *Gibson v. Minett* (3), where a bill was made payable to a fictitious payee or order, and the defendants sought to avail themselves of their own fraud, evidence was admitted which enabled the indorsee to recover as on a bill payable to bearer. In like manner the nature of an alteration in an instrument may be explained by extraneous evidence. Thus, in *Knight v. Clements* (4), where a bill of exchange, the appearance of which left it uncertain whether it had been altered before or after issue, was submitted to a jury, with a direction that if, from its appearance, they believed the alteration to have been made before the bill was completed, and while the ink was wet, they should find for the plaintiff, the Court set aside the verdict, on the ground that the plaintiff should have shown, by extraneous evidence, that the alteration was properly made.

If the defendants had been sued for 245*l.*, the contract price of the lead they purchased, it would have been a sufficient defence to show that they gave this bill in payment.

Peacock for the defendants :

There is a patent ambiguity on the face of this bill of exchange, and statements could not be made to explain that ambiguity, without violating one of the clearest rules of evidence.

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In *Rex v. Elliott* there was no discrepancy between the body of the note and the margin, but a mere omission in the body of the note which the margin sufficiently supplied ; as the venue in the margin of a declaration may supply the place of, but not contradict, a venue in the declaration itself. The stamp cannot be called in aid without resorting to the parol evidence ; and, in the ordinary question, whether an agreement between landlord and occupier be a lease, or merely an agreement for a lease, the decision of the Court is never governed by the stamp, for a lease stamp is often

(1) 1 Br. C. C. 472.

(2) 2 P. Wms. 141.

(3) 1 R. B. 754 (1 H. Bl. 569).

(4) 47 R. R. 563 (8 Ad. & El. 215 ;

3 N. & P. 375).

affixed on that which turns out to be a mere agreement. The passages in Marius and Beawes are altogether in favour of the defendants; and though it may be prudent for the drawee to wait for further advice, it by no means follows that evidence of such advice would be admissible in a court of law to explain a patent ambiguity. But at the time when those authors wrote, bills might be accepted by parol, and the acceptance therefore might be open to parol explanation. Since 1 & 2 Geo. IV. c. 78, acceptances can only be in writing. In all the cases where mercantile usage has been admitted to explain a contract, the ambiguity has been latent, as it was in *Fonnereau v. Poyntz* and *Beaumont v. Fell*. Whether or not this bill would furnish a defence to an action for 245*l.* on the contract for the sale of lead, is only the same question as the present put in other words: the short answer is, that the ambiguity being patent, is not by the rules of our law open to explanation: the meaning of the parties being uncertain, the instrument is void, and the plaintiff can recover nothing.

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Wilde, in reply :

The question is, what was the intention of the parties; and when that intention is shown, as it may be shown by the collateral fact of the contract *for lead, there is no ambiguity in the instrument especially when mercantile usage shows that the acceptor always accepts the figure in the superscription. The rule of *fortius contra proferentem* would have no applicability at all, if it were not applicable to a case like the present.

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TINDAL, Ch. J. :

The only question in this case is, whether the evidence adduced on the trial of the cause was admissible or not: and, under the circumstances, I am of opinion that it was not admissible. This is a case of *ambiguitas patens*, and, according to the rules of law, evidence to explain such an ambiguity is not admissible. Where there is doubt on the face of the instrument the law admits no extrinsic evidence to explain it. Now, on the body of the bill in question, it appears to have been drawn for two hundred pounds; but in the margin, the figures express the sum of 245*l.* If this creates any ambiguity, it is one which arises on the face of the instrument. In most of the cases cited for the plaintiff the ambiguity arose from matters not appearing on the instrument. In *Gibson v. Minett*

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So, in the instance of commercial instruments the difficulty rarely appears upon the face of the instrument; but arises from the custom of the country or the usage of trade. In *Rex v. Elliott* the Court looked at the sum in the margin in order to show the intention of the party in uttering the bill, but not to show the meaning of the bill itself. The evidence in question not being admissible, we cannot shake the rule of commercial writers, that where a difference appears between the figures and the words of the bill, it is safer to attend to the words. If we take the authority of those *writers where we have none of our own, this is a good bill for the sum expressed in the body; and therefore I am of opinion that the plaintiff is entitled to judgment for 200*l*.

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BOSANQUET, J. :

I am of the same opinion. The question is, whether this instrument is a bill for 245*l*., or 200*l*., or whether it is altogether void. If it turns out to be a bill for 200*l*., it is a case for amending the declaration, and the verdict should be entered accordingly. It is true that there was abundant evidence to show that this was intended as a bill for 245*l*., if that evidence was admissible; but the evidence was not admissible, because this is a case of patent ambiguity, and our rules of evidence exclude explanation where the ambiguity is patent. It is true, some foreign writers have said that in such a case the drawee should wait for instructions: and it would, no doubt, be prudent he should do so; that, however, cannot alter our rules of evidence. But the same writers also lay it down that in the absence of instructions the words at length, and not the figures, are to determine the sum to be paid: and we think that is the rule that should be followed.

The argument that pressed me most, is the rule of *fortius contra proferentem*: that an instrument must be taken most strongly against the party making it. But there is no case in which that principle has been applied to an instrument, the body of which expresses a clear amount, and the ambiguity arises from a different amount expressed in the margin. Under such circumstances the rule of law as to evidence must prevail.

COLTMAN, J. :

This is a case of some difficulty; and though evidence cannot be

admitted to explain a patent ambiguity, I cannot help thinking that where a party signs an instrument with two hundred pounds in words, *and 245*l.* in figures, it should be taken most strongly against the party signing it; as in *Edis v. Bury* (1), where an instrument was made in terms so ambiguous as to make it doubtful, whether it were a bill of exchange or a promissory note, it was held, that the holder might at his election (as against the maker of the instrument), treat it as either: and Lord TENTERDEN says, “Where a party issues an instrument of an ambiguous nature the law ought to allow the holder, at his option, to treat it either as a promissory note or bill of exchange.”

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This seems to me to fall within the principle of that case. The oversight of the acceptor has tended to mislead the holder: if it was done with a fraudulent intention, there can be no doubt that the plaintiff would be entitled to the whole; there is no fraud here; but, upon the whole, I think this should be taken to be a bill for 245*l.*

ERSKINE, J.:

I think this is a bill for 200*l.*, and not for 245*l.* The rule of law is, that where an ambiguity appears on the face of an instrument, you cannot adduce evidence to explain it; as, where there is a devise to one of the sons of J. S., evidence cannot be received to explain which: but if a testator leaves property to the eldest son of J. S. and two persons,—as in the case of a second marriage,—meet that designation, you may admit evidence to explain which of the two was intended. Here the ambiguity is entirely on the face of the instrument. It is doubtful which of the two sums mentioned is the amount intended to be paid; but the doubt must be solved by the ordinary rules of construction: if the larger sum had been in words, I should have agreed with my brother COLTMAN, for, according *to the authorities, figures are not of the same authority as words in the body of a bill, except in cases where the margin does not contradict, but is only an index to the body, as in *Rex v. Elliott*. I am of opinion that the words in the body must be taken as containing the amount of the bill to be paid.

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*Judgment for 200*l.**

1839.
May 1.

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J. STERT AND ANOTHER, EXECUTRIX AND EXECUTOR OF
J. BURN, DECEASED, v. G. PLATEL.

(5 Bing. N. C. 434—441; S. C. 7 Scott, 422; 8 L. J. (N. S.) C. P. 249.)

Devise to A. H. for life; remainder to R. H. for life, and to his first and other sons in tail; and for default of issue to A. D. H. for life; remainder to his first and other sons in tail; and in default of such issue to "such person bearing the surname of H. as shall be the male relation nearest in blood to the said R. H., and his heirs for ever:" Held, that the ultimate remainder vested in interest upon the death of the testatrix.

THIS was an action of assumpsit brought by the plaintiffs as executrix and executor of Jane Burn deceased, to recover from the defendant the sum of 120*l.* alleged to have become due from him to her in her lifetime, for the use and occupation of two messuages with the appurtenances at Peterborough, in the county of Northampton. The defendant pleaded the general issue. A verdict was found for the plaintiffs with 120*l.* damages, subject to the opinion of the Court upon the following case:

Eleanor Hake, being seized in fee of the messuages for the use and occupation of which this action was brought, on the first of May, 1784, by her will, duly executed for passing real estates, devised the messuages to Abraham Hake for life; with remainder to trustees to preserve contingent remainders; with remainder to Richard Hake, son of Abraham, for life; with remainder to trustees to preserve contingent remainders; remainder *to the first and other sons of the said Richard, successively in tail male; with remainder in default of such issue to Abraham David Hake, another son of the said Abraham, for life; with remainder to trustees to preserve contingent remainders; with remainder to the first and other sons of Abraham David, successively in tail male. The will then proceeded as follows: "And in default of such issue, I give and devise the same premises unto such person bearing the surname of Hake, as shall be the male relation nearest in blood to the said Richard Hake, and to his heirs for ever."

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Eleanor Hake died in the year 1784, without having revoked or altered her will; and Abraham Hake entered into the possession of the premises: he died so possessed of them in the year 1792, leaving the said Richard and Abraham David, his two sons, him surviving; and on his death the premises came into the possession of the said Richard, who died in the year 1813, without having had issue; Abraham David then entered into possession of the premises, and

continued so in possession or in the receipt of the rents and profits thereof until his death.

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Several years previous to the death of the said Abraham David, the defendant became his tenant of the premises, and continued to be such tenant up to and at the time of his, Abraham David's, death, and paid him rent for the same, as such tenant. After the death of Abraham David, the defendant continued to occupy the premises up to and at the time this action was brought, and the sum of 120*l.* was then due from him for the rent thereof. In the year 1826, Abraham David, so then being in possession or in the receipt of the rents and profits of the premises, by his will duly executed for passing real estates, devised the same to the said Jane Burn in fee. Abraham David died on the 28th of September, 1833, without having had *issue, leaving the said Jane him surviving; and the defendant having refused to pay the rent which had accrued due from him for the occupation of the premises after the death of the said Abraham David, to Jane Burn in her lifetime, or to the plaintiff's executrix and executor, or to either of them, since her death, this action was brought.

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The question for the opinion of the Court was, whether the premises passed to Jane Burn by the will of Abraham David: if the Court should be of opinion that the premises did so pass, then the verdict was to stand; but if otherwise, then a nonsuit was to be entered.

N. R. Clarke for the plaintiff:

The question is at what period the ultimate remainder in fee vested. If it vested before the death of Ab. Dav. Hake, the plaintiffs are entitled to recover; if it did not vest before his death, the plaintiffs' title fails. It vested at the death of the testatrix Eleanor, for a remainder is never construed as contingent after the earliest period at which it can vest. *Ives v. Legg* (1), per BAYLEY, J. in *Doe v. Maxey* (2), per BAYLEY, J. and DAMPIER, J. in *Driver v. Frank* (3), *Doe v. Pratt* (4), *Cholmondely v. Clinton* (5). It does not appear that the testatrix had any particular class of persons in view; and the expression "such person as shall be the nearest in blood," unaided by any specification of time, does not imply a more

(1) In note to *Doe d. Comberbach v. Perryn*, 1 R. R. 760 (3 T. R. 488).

(2) 12 East, 589.

(3) 15 R. R. 385 (3 M. & S. 25).

(4) 5 B. & Ad. 731.

(5) 21 R. R. 419 (2 B. & Ald. 625);
22 R. R. 84 (2 Jac. & W. 1).

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distant future than the death of the testatrix: *Doe v. Lawson* (1), *Doe v. Maxey*, *Spinks v. Lewis* (2), *Holloway v. Holloway* (3), *Pearce v. Vincent* (4).

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Lee, for the defendant:

The rule as to vesting of remainders, must be taken subject to the intention of the testator: per BAYLEY, J. and Sir T. PLUMER, in *Cholmondely v. Clinton*. And here there is a circumstance which shows it to have been the intention of the testatrix, that the remainder should not vest till the death of Abraham David Hake without issue: for she has given him and his brother and father estates in succession; and if she had intended that either of them should take also the ultimate remainder, she would so have expressed herself, instead of leaving it to the male relation nearest in blood. The gift is also to the person who shall be nearest in blood; by that expression she meant some person not then in her view; while Abraham David, his brother and father, were clearly before her. *Phillips v. Deakin* (5) shows that the rule is not inflexible, but must be controlled by the intention of the testator: and in *Pyott v. Pyott* (6), where Lord HARDWICKE recognised *Bon v. Smith* (7), but disputed its authority, *Marsh v. Marsh* (8), *Jones v. Colbeck* (9), *Miller v. Eaton* (10), *Bird v. Wood* (11), *Briden v. Hewlett* (12), and *Butler v. Bushnell* (13), general ultimate dispositions of property have, where the intention of the testator appeared to require it, been held to vest, not at the death of the testator, but after the determination of some intermediate estate devised by him.

In *Doe v. Maxey*, it was questionable whether there was any gift: some of the Judges thought the old reversion vested in the heir. In *Driver v. Frank*, Lord ELLENBOROUGH thought the intention of the testator, if a lawful one, must prevail. *Doe v. Lawson* was the case *of a gift to the next of kin in such proportions as they would be entitled to according to the Statute of Distributions, the provisions of which refer to the time of the testator's death. The same observation applies to *Spinks v. Lewis*. *Holloway v. Holloway* was

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(1) 7 R. R. 454 (3 East, 278).

(2) 3 Br. C. C. 355.

(3) 5 R. R. 81 (5 Ves. 399).

(4) 2 Bing. N. C. 328.

(5) 1 M. & S. 744.

(6) 1 Ves. 336.

(7) Cro. El. 532.

(8) 1 Br. C. C. 293.

(9) 6 R. R. 237 (8 Ves. 38).

(10) 14 R. R. 259 (G. Coop. 272).

(11) 25 R. R. 238 (2 Sim. & St. 400).

(12) 39 R. R. 146 (2 My. & K. 90).

(13) 41 R. R. 54 (3 My. & K. 232).

a case of gift of personal estate to heirs, which TINDAL, Ch. J. thought the same as a gift to next of kin: and in *Pearce v. Vincent*, there was a precise reference to the time of the testator's death. On the other hand, in *Leigh v. Leigh* (1), LAWRENCE, J. said, that even the absurdities of testators had been looked to, to ascertain their meaning.

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N. R. Clarke :

It is not contended on behalf of the plaintiffs that the rule is inflexible; but there is nothing here to show an intention that the remainder should not vest at the death of the testatrix; and in *Driver v. Frank*, DAMPIER, J. says, "If a testator expresses an intention precisely, in clear and positive terms, and there is no legal objection to it, no inconvenience arising from a literal adherence to such intention, so expressed, is to be regarded. The case is very different where the intention is not fully expressed, but is to be collected and inferred as only probable. In that case the probability, from which the intention is to be inferred, may be outweighed by the improbability, that the testator could intend to make a distribution of his property, attended with such inconveniences as would follow from carrying into execution his supposed intention." The previous devise indicates nothing decisive, for it is common to give the same person a particular estate, and then a remainder: *O'Keefe v. Jones* (2). In *Doe v. Lawson*, GROSE, J. said, "Nothing is more common than that an estate for life should be given to one to whom a remainder over in fee is afterwards *devised." With the exception of *Bon v. Smith*, which was overruled by Lord HARDWICKE, all the cases cited for the defendant are cases of dispositions of personal property, to which the rule as to contingent remainders does not apply: they are not cases of remainders, but executory devises, where no question can arise as to the time of vesting; and in all of them the intention was clearly expressed.

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TINDAL, Ch. J. :

The question is, whether, as it has been contended on the part of the plaintiffs, there is a general rule that, under circumstances such as the present, the ultimate limitation of an estate shall vest at the death of the testator, and not await the expiration of the particular estate: on the part of the defendant, it is insisted that this rule is

(1) 10 R. R. 31 (15 Ves. 92).

(2) 13 Ves. 413.

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subject to be controlled by the intention of the testator ; but considering that most of the cases cited for the defendant, are cases touching personal property, I think the general principle that a remainder shall vest at the earliest period must prevail in this case. That rule, as laid down in *Doe v. Lawson*, and *Doe v. Maxey*, is no doubt open to be controlled by intention clearly expressed : but as the general rule affords the sounder rule of construction, and as there is in this case no sufficient indication of intention to vary it, our judgment must be for the plaintiffs. The only words here, from which it is sought to show a contrary intention, are, after previous limitations, “in default of such issue, to such person as shall be the nearest in blood.” But those words occur in *Doe v. Lawson* ; and though they show an intention that the estate shall not vest in enjoyment till such default of issue, it may vest in interest before ; for in *Doe v. Maxey*, GROSE, J. says, “great stress has been laid on the words ‘as shall appear and can be proved,’ &c., but the omission of the word then, which has occurred *in other cases, shows that the trustees were not to look to the persons who should be the testator’s next of kin at the time when the contingency happened, but according to the plain meaning of the words used, to such as were his next of kin at the time of his death, who alone were entitled to take by the Statute of Distributions, in case of his intestacy.” Therefore as the general principle is that a remainder shall be construed to vest, rather than remain contingent, it is better to adhere to that rule, and decide in this case for the plaintiffs.

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BOSANQUET, J. :

The general rule is, that a remainder shall vest rather than remain contingent, but there are cases which say that a clear expression of intention may prevail against the rule. Here, the disposition, after some previous limitations, is, “in default of issue I give the premises to such person as shall be nearest in blood ;” and the defendant relies on the word “shall :” but the word “then” is not coupled with it, and we must see that the intention is clearly expressed before we decide that the general rule is not to prevail. When a man makes his will, he looks to the period of his death, and his expressions have necessarily a future import : he does not know who then will be his nearest in blood. Here, no particular time is pointed out at which the remainder is to vest, and therefore I think the general rule ought to prevail.

The cases relied on for the defendant are chiefly cases of personal property; but *Doe v. Lawson* bears closely on the present. There, a testator devised to his natural son, and in case of his marriage with certain persons, or his dying without issue, then to his nephew for life, and after his decease, then for and amongst such person and persons, his and their heirs, &c., as should appear and could be proved to be his next of kin, in such proportions as they would by virtue of *the Statute of Distributions have been entitled to his personal estate if he had died intestate; and it was held that the distribution must be made amongst the testator's next of kin at the time of his death, though the nephew, to whom a prior life estate was given, were one of them. It has been contended that the expression used there could only be construed according to the Statute of Distributions. But the expression here is no more than an amplification of the same words, and I see no reason for coming to a different decision.

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COLTMAN, J.:

I am of the same opinion. It is expedient to adhere to general rules; and the rule applicable here is, that a remainder is not to remain in contingency unless the testator's intention to that effect be manifest. No intention contrary to the rule is manifest here, and the cases cited for the defendant relate to personal property or executory devises.

ERSKINE, J.:

If the testatrix had expressed an intention as clearly as in *Pearce v. Vincent* and *Phillips v. Deakin*, there would have been no occasion to refer to the general rule; but as she has not so expressed it, we are thrown back on the general rule, and our judgment must be for the plaintiffs.

Judgment for plaintiffs.

PETCH v. FOUNTAIN.

(5 Bing. N. C. 442—444; S. C. 7 Scott, 441; 8 L. J. (N. S.) C. P. 305; 3 Jur. 436; 7 Dowl. P. C. 427.)

1839.
May 2.

[442]

To an action, brought June 27th, defendant pleaded, by way of set-off, a claim against plaintiff, which was not payable till August 1st, though the consideration had been received by plaintiff before her action was commenced. Under a Judge's order of July 27th, "by consent of both sides, all matters in difference between the parties, including the claim of defendant

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in her set-off in the said action," were referred to arbitration: Held, that the claim made in the set-off was properly entertained by the arbitrator as a matter in difference, though not payable till after the date of the action and the Judge's order.

By a written agreement between the plaintiff and defendant, who were both schoolmistresses, the defendant took of the plaintiff a house from Lady Day, 1838, at sixty guineas a year, payable quarterly; and the plaintiff agreed to pay the defendant 21*l.* a year each for the board of twenty-three young ladies: the payment to be made by instalments on the 1st of August, the 1st of November, the 1st of February, and the 1st of May in every year.

Three days after Midsummer, 1838, the plaintiff sued the defendant for 15*l.* 15*s.*, one quarter's rent, and also brought against her an action for slander.

At this time the defendant had incurred, in boarding the young ladies for one quarter, an expense of 129*l.* According to the agreement, it was not payable till August 1st: the defendant, however, pleaded it as a set-off against the plaintiff's claim of 15*l.* 15*s.* for rent, together with a plea of the general issue.

Issue was joined on both pleas.

On the 27th of July, it was directed by a Judge's order, and "by consent of both sides, that all matters in difference between the parties, including the claim of the defendant in her set-off in the first action," should be referred to arbitration.

The parties attended the arbitrator in November following. He awarded, in the first action, that the plaintiff should have a verdict for 15*l.* 15*s.* on the first *issue joined; and also a verdict on the alleged set-off; he found that the plaintiff had no cause for bringing the action of slander; and as to the matters in difference, awarded that the plaintiff should pay the defendant 129*l.*

Wilde, Serjt. obtained a rule *nisi* to set aside so much of the award as regarded the payment of 129*l.* by the plaintiff to the defendant, on the ground that, as the sum was not due when it was pleaded as a set-off, nor when the Judge's order was made for referring the causes to arbitration, it could neither be treated as a set-off nor as a matter in difference.

Bingham, who showed cause, contended that it might be treated as a matter in difference, even independently of the order of reference: it was not essential to a matter in difference that it should be a legal claim; it is because parties make or resist claims

without legal warrant, that differences arise which can only be terminated by lawsuit or arbitration: at all events, this claim was made a matter in difference by the express language of the order of reference; and it never could have been the intention of the defendant to enter into a reference on the 27th of July about the plaintiff's claim of 15*l.* 15*s.*, and exclude her own claim of 129*l.*, which she could legally enforce three days afterwards.

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Wilde :

The order of reference must be intended to include, as a matter in difference, the set-off in the action, if any; but there was none, because the 129*l.* did not accrue to the defendant till the 1st of August, while the plaintiff's demand was complete the 24th of June, and the order of reference itself was made before August.

TINDAL, Ch. J.:

This is, in effect, a question as to what was the intention of the parties in entering into *the order of reference. If the defendant's demand had been strictly a set-off, there would have been no necessity for making any express mention of it in the order of reference; but it was a claim made by the defendant; and, whether well or ill founded, she makes that claim by express words a part of the order of reference. The award, therefore, is correct, and this rule must be discharged.

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BOSANQUET, J. and COLTMAN, J. concurred.

ERSKINE, J.:

The words of the order of reference are quite wide enough to include what was the evident intention of the parties.

Rule discharged.

EASTMURE v. LAWS.

(5 Bing. N. C. 444—453; S. C. 7 Scott, 461; 2 Arn. 54; 3 Jur. 460; S. C. nom. *Eastmure v. Hawes*, 8 L. J. (N. S.) C. P. 236; 7 Dowl. P. C. 431.)

1839.
May 3.
[444]

When a verdict is found against a defendant on a plea of set-off, he is estopped from suing the plaintiff for the demand specified in the plea of set-off.

DEBT for money had and received by the defendant to the use of the plaintiff; money paid by the plaintiff; and on an account stated.

Plea, that before the commencement of this suit, to wit, on, &c.,

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the now defendant impleaded the now plaintiff in an action on promises in her Majesty's Court of Exchequer at Westminster, and afterwards, to wit, on, &c., declared in the said action, and in her declaration, according to the course and practice of the said Court, complained that the now plaintiff was indebted to her in the respective sums of 200*l.*, 200*l.*, 200*l.*, and 200*l.*, for and upon the considerations therein mentioned. That afterwards, to wit, on, &c., the now plaintiff by his attorney, amongst other pleas, pleaded

[*445] in the said action, *as to the causes of action in the declaration mentioned, except 50*l.*, part thereof, that the now defendant, before and at the time of the commencement of the said action in the Court of Exchequer, and at the time of pleading the said plea, was indebted to the now plaintiff in 250*l.* for money had and received by the now defendant for the use of the now plaintiff; and that the now plaintiff was ready and willing, and did, by his said plea, offer to set off and allow to the now defendant, out of the last mentioned sum of money, the full amount of her damages in the said action; part of which last mentioned sum of money, so pleaded in the said action by the now plaintiff by way of set-off, was the identical sum of money in the now plaintiff's declaration, and for which the now plaintiff had impleaded the now defendant. That afterwards, to wit, on, &c., the now defendant, by way of replication to the plea of set-off, replied that she was not indebted to the now plaintiff in manner and form as the now plaintiff in his plea of set-off alleged; and thereupon issue was joined between the parties, and such proceedings were thereupon afterwards, to wit, on, &c., had, that the jurors of the jury being summoned in the said action, and having come to speak the truth of the matters in issue in the said action, and being chosen, tried, and sworn, did, as to the said issue upon the plea of set-off, say upon their oath that the now defendant was not indebted to the now plaintiff in manner and form as the now plaintiff in his plea of set-off alleged: and afterwards, to wit, in Hilary Term, 1888, the now defendant, by the consideration and judgment of the Court, recovered in the said action against the now plaintiff 97*l.* 8*s.* for her damages which she had sustained, as well on occasion of the not performing of the promises in her declaration, as for her costs and charges by her in that behalf expended, whereof the now plaintiff was convicted; as by the

[*446] record *and proceedings thereof, still remaining in the said Court of Exchequer at Westminster, more fully and at large appear; which judgment still remains in full force and effect, and not in

the least reversed or made void: and that, the now defendant was ready to verify by the said record; wherefore she prayed judgment, if the now plaintiff ought to be admitted to say that the now defendant was indebted to him upon the consideration and causes of action in the first count of the declaration mentioned.

Replication; that the now plaintiff ought to be admitted to say that the now defendant was indebted to him upon the said causes of action therein mentioned; because, although the now defendant impleaded the now plaintiff in the action in the last plea mentioned, in manner and form as was therein set forth, and the now plaintiff did in the said action plead—amongst other pleas—that the now defendant was indebted to him in the several sums of money in his plea mentioned, and that he was ready and willing, and did, by his plea, offer to set off and allow to her, out of those sums of money, the full amount of her damages in the action; and although part of the said sum of money, so pleaded in the said action by way of set-off, was the identical sum of money in the now plaintiff's declaration mentioned, and for which he had impleaded the defendant; and although the now defendant did reply to the plea of the now plaintiff, as in the last plea of the now defendant was alleged, and the jurors of the jury summoned in the said action did say, as to the issue upon the said plea of set-off, that the now defendant was not indebted to the now plaintiff, in manner and form as in the plea of set-off was alleged; yet the said jurors of the jury so said, because the now plaintiff did not, at the time of the said action, give or offer to the jurors of the jury aforesaid any evidence *whatever in support of his plea of set-off; nor was he prepared, nor did he seek at the trial to substantiate, or in any way to sustain the said plea, or to prove that the several sums of money therein mentioned were due and owing by the now defendant to the now plaintiff as in that plea alleged; nevertheless, those several sums of money were at the time of the said trial, and still remained, due and owing to him from the now defendant, and had never been in any way paid, satisfied, or discharged; and that, the now plaintiff was ready to verify; wherefore he ought to be admitted to say, that the defendant was indebted to him upon the consideration and causes of action in the first count of the declaration mentioned; and he prayed judgment and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof, to be adjudged to him.

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Demurrer, for that the matters alleged in the replication did

EASTMURE not confess and avoid the plea, and because the matters pleaded,
v. if true, would be only an equitable and not a legal answer to the
LAW. plea.

Joinder.

[After argument:]

[451] **TINDAL, Ch. J.:**

I am of opinion that the plea is a good one, and that no sufficient answer has been given to it in the replication.

This is an action of debt, with the common counts for money had and received, money paid, and on an account stated.

The plea states, that the defendant in this action having formerly sued the plaintiff, he pleaded a set-off against the demand made in that action; that a verdict was given against the party pleading the set-off; and that the present action is brought to recover the identical claim specified in that set-off. And the question is, whether, after a precise issue on the same point has been found against the plaintiff, he may bring an action and agitate the whole matter over again.

There can be no doubt that, if the plaintiff had sued the defendant for this sum in a former action, and, after plea, a verdict had been found against him, he could never have brought the matter again in question, on the ground that he was not then prepared with evidence.

It has been urged, that there is a hardship in concluding defendants by the result of a plea of set-off, while a plaintiff who fails in an action may elect to be nonsuited, and bring a fresh action when he is better prepared. But it is the defendant's election to put such a plea on the record; and if, before or at the trial, he wishes it, on proper terms the issue may be withdrawn: after all, it is entirely a matter of his own election.

[*452] A second hardship is alleged, that the defendant, though he succeed in showing a certain amount due to him, must still have a verdict against him in the event *of his failing to prove as much as the plaintiff demands. The answer to which is, that if the plaintiff's demand be 100*l.*, and the defendant proves to the extent of 90*l.*, according to the case of *Moore v. Butlin* (1), that may be deducted from the damages. Consistently with the decision in *Outram v. Morewood* (2), I cannot see how

(1) 7 Ad. & El. 595; 2 N. & P. 436.

(2) 7 R. R. 473 (3 East, 346).

an estoppel can be set aside on the ground set up by this replication.

EASTMURE
v.
LAWSON.

BOSANQUET, J. :

After a matter has once been put in issue, the verdict and judgment may be pleaded by way of estoppel: that has been done here, with an averment of the identity of the demand made by the party who pleaded the set-off and who now brings the present action.

It is urged, that this estoppel operates with hardship on defendants: it may be so in some few cases, but it is always in consequence of the defendant's election that the plea of set-off is put on the record; and even where the verdict is found against him because he proves a lower amount than the plaintiff's demand, he has the benefit of what 'he proves in the reduction of the plaintiff's damages: he may also apply for leave to take his plea off the record, on payment of costs to the last moment, if he has not means to prove what he alleges. But if he puts the plaintiff to trouble and expense to contest the plea, he must abide by the consequence.

COLTMAN, J. :

I am of the same opinion. *Outram v. Morewood* decides, that where the same fact has been put in issue in a former cause, the verdict in that cause is an estoppel in a second action for the same subject-matter: here the same claim has been put in issue, and has already been decided between these parties; for a replication of *nil debet* to a plea of set-off has the *same effect as a plea of *nil debet* to an action of debt. Nor is this attended with hardship on defendants, for if a defendant proves any part of his claim, it is allowed him in reduction of damages.

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Perhaps it might be better if there were a special finding; but if the defendant distrusts the strength of his proof, he may at any time withdraw his plea.

ERSKINE, J. :

The replication in this case, admitting that there was a verdict and judgment against the party pleading the set-off in the former action for precisely the same claim as the plaintiff makes in this, cannot, in my opinion, be supported.

Judgment for defendant.

1839.
May 3.
 [455]

MILLS v. FOWKES (1).

(5 Bing. N. C. 455—465; S. C. 7 Scott, 444; 2 Arn. 62; 8 L. J. (N. S.)
 C. P. 276; 3 Jur. 406.)

1. Accounts not in writing are not accounts excepted by the Statute of Limitations.

2. Where a debtor owes his creditor some debts from a period longer than six years, and others from a period within six years, and pays a sum without appropriating it to any particular debt, such payment is not a payment on account, to take out of the Statute of Limitations the debts due longer than six years: but,

3. The creditor may at any time apply such payment to the debts due longer than six years.

[456] THIS was an action of debt, the declaration containing *indebitatus* counts for several demands. Among other pleas the defendant pleaded pleas of set-off, of payment, and of the Statute of Limitations; and, to one of the counts in the declaration, a plea of payment of money into Court of 107*l.* 4*s.* 5*d.* The plaintiff replied to the plea of set-off *nil debet* as to part of the *sum mentioned in the plea; and the Statute of Limitations as to the residue. Issue was joined between the parties on those and the other pleadings in the cause.

The cause having been referred to arbitration,

The arbitrator found, first, with reference to transactions that were in point of time within the bar of the Statute of Limitations, viz. more than six years before the commencement of this suit, that there was a debt due from the defendant to the plaintiff, for rent and other things, which had been reduced by payments to the sum of 156*l.* 19*s.* 7*d.*; that there was a cross debt or set-off due from the plaintiff to the defendant accrued during the same time, amounting to the sum of 51*l.* 10*s.* 6*d.*; and, secondly, as to the time within six years before the commencement of this suit, that the defendant was indebted to the plaintiff in the sum of 150*l.* 0*s.* 5*d.*; that the defendant was entitled to a set-off of the sum of 7*l.* 16*s.*, and that the payment into Court must be applied, and the arbitrator did apply the same, to that part of the account: that the defendant had also paid the sum of 20*l.* to the plaintiff, which must be applied, and the arbitrator did apply it, also to that part of the account, that is to say, he applied the said sums

(1) Cited and followed in the Exchequer Chamber, *City Discount Co. v. McLean* (1874) L. R. 9 C. P. 692, 700, 43 L. J. C. P. 344, 350. Commented

on and distinguished by STIRLING, J. in *Friend v. Young* [1897] 2 Ch. 421, 432, 66 L. J. Ch. 737, 745.—R. C.

MILLS
G.
FOWKES.

paid and paid into Court to that part of the plaintiff's demand which had accrued within six years next before the commencement of this suit: that there was not at any time any written statement of the account between the parties signed by them or either of them: that the defendant did, on or about the 22nd of April, 1887, pay to the plaintiff the sum of 15*l.*: that before and at the time that the defendant paid the said sum of 15*l.*, it was known to both parties that there were unsettled cross demands between them, partly within and partly without the time limited by the statute: that there was no appropriation in fact of the said sum of 15*l.*, either by the plaintiff or the defendant: *and that there did then exist a debt not barred by the statute, considerably exceeding in amount the sum of 15*l.*, to which debt the payment might then have been referred.

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The arbitrator then awarded and directed, that if the Court should be of opinion that, under the above circumstances; the plaintiff might treat, or the Court might treat, the payment of the said sum as a part payment of the debt that existed more than six years before the commencement of the suit, or, if the Court were of opinion that the fact that there were cross demands between the parties without any written statement of them signed by the parties, or either of them, was sufficient to take the whole case out of the Statute of Limitations, then that the defendant should pay to the plaintiff the sum of 156*l.* 10*s.* 6*d.*, if the Court should be of opinion that the defendant was not entitled to the benefit of the set-off accruing to him more than six years before the commencement of the suit; but the defendant was to pay to the plaintiff the sum of 105*l.* 9*s.* 1*d.* only, if the Court should be of opinion that he was entitled to the benefit of the last-mentioned set-off. But if the Court should be of opinion that the whole case was not taken out of the statute under the circumstances, but that the plaintiff was at liberty to appropriate, or, in contemplation of law, must be taken to have appropriated, the said sum of 15*l.* to the debt existing more than six years before the commencement of this suit, then the defendant was to pay to the plaintiff the sum of 15*l.* If the Court should be of opinion that the payment of the said sum of 15*l.* must, under the circumstances, be taken to be a part payment on account of the debt which accrued within six years before the commencement of the suit, then the arbitrator found that, taking into account the sum paid into Court, the plaintiff had been fully paid and satisfied by the defendant; *and

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awarded that the plaintiff was not entitled to recover any thing from the defendant.

Humfrey, for the defendant :

1st, There having been no account in writing, nor any payment ascribed by the debtor to the discharge of a particular debt, this was not such an open account between the parties as would take the plaintiff's claim out of the Statute of Limitations since 9 Geo. IV. c. 14: *Williams v. Griffiths* (1), *Waters v. Tomkins* (2).

(This was conceded by *Waddington* for the plaintiff.)

2ndly, The payment of 15*l.* by the defendant, without appropriation on either side, is not such a payment as takes the earlier part of the plaintiff's demand out of the Statute of Limitations. In order to have that effect, it should appear that it was a part payment of a greater debt, and that debt the debt for which the action is brought: *Tippets v. Heane* (3). But there is nothing here to show that the 15*l.* was paid in respect of the debt barred by the statute: on the contrary, as nothing was said at the time of payment, and the defendant was safe from liability in respect of the debt so barred, it must be inferred he paid it in respect of the debt not barred: therefore

3rdly. The plaintiff is not entitled to recover even the 15*l.*; for the principle of the civil law adopted in *Clayton's* case (4) is, that the debtor has the right, in the first instance, to appropriate a payment to such debt as he thinks fit: if he omits to appropriate it, the creditor may do so: but, if neither make any appropriation, the law appropriates the payment to the debt most burdensome to the debtor: as where one of two debts would support a commission of bankruptcy, and the other not: *Meggot v. Mills* (5), *Dave v. Holdsworth* (6). Here the *more burdensome debt was that which was not barred by the Statute of Limitations. So, where one of two demands is illegal, the law appropriates the payment in discharge of the legal demand: *Wright v. Laing* (7). But, even where the creditor makes the appropriation, he must distinctly specify the debt he proposes to discharge, and do that within a

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(1) 41 R. R. 685 (2 Cr. M. & R. 45).

(2) 41 R. R. 827 (2 Cr. M. & R. 723).

(3) 40 R. R. 549 (1 Cr. M. & R. 252).

(4) 15 R. R. 161 (1 Mer. 572).

(5) 1 Ld. Ray. 286.

(6) 15 R. R. 595, n. (5 Taunt. 601, n.; 1 Peake, 89).

(7) 27 R. R. 313 (3 B. & C. 165).

reasonable time: *Bodenham v. Purchas* (1), *Simson v. Ingham* (2), *Philpott v. Jones* (3). *Peters v. Anderson* (4), in which the creditor was allowed to apply the payment to the debt for which he had the worst security, was prior to *Clayton's* case, and is not consistent with the subsequent cases.

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Waddington, for the plaintiff:

The principle of the civil law, that a payment unappropriated by debtor or creditor shall be ascribed to the more burdensome of several debts, has never been adopted in England; *Wright v. Laing* establishes the reverse: and the rule settled by *Clayton's* case, *Bodenham v. Purchas*, and *Simson v. Ingham*, is that, in the absence of appropriation on either side, the payment shall be ascribed to the earlier debt. The plaintiff, therefore, is clearly entitled to recover 15*l.*: but,

2ndly, That payment must be taken, in point of fact, to have been a part payment by the defendant on account of the larger debt due to the plaintiff before the statutory six years; for he knew there was a balance against him; he did not pay the money on account of the balance; and therefore he must have paid it on account of the earlier debt, which was thereupon taken out of the Statute of Limitations. At all events,

The plaintiff might ascribe it to the earlier debt, and that, at any time: *Manning v. Westerne* (5), *Goddard v. Cox* (6), *Kirby v. Duke of Marlborough* (7), *Bosanquet v. Wray* (8), *Philpott v. Jones*; and he must be taken so to have ascribed it, if that debt were barred by the statute, according to the principle laid down in *Peters v. Anderson*.

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TINDAL, Ch. J.:

It having been conceded on the part of the plaintiff, that the account between these parties was not excepted from the operation of the Statute of Limitations as an open account, there remain, in effect, two points to be decided:

1st, Whether the payment of 15*l.* in April, 1837, was such a part payment as takes out of the operation of the statute the debts contracted more than six years before the commencement of the action; and if not,

(1) 20 R. R. 342 (2 B. & Ald. 39).

(2) 26 R. R. 273 (2 B. & C. 65).

(3) 41 R. R. 371 (2 Ad. & El. 41).

(4) 15 R. R. 592 (5 Taunt. 596).

(5) 2 Vern. 606.

(6) 2 Str. 1194.

(7) 14 R. R. 573 (2 M. & S. 18).

(8) 16 R. R. 677 (6 Taunt. 597).

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2ndly, Whether the plaintiff has now a right to apply that 15l. in discharge of a debt barred by the statute : and

First, we think this was not such a part payment as to take the earlier portions of the account out of the operation of the statute.

The law has been correctly laid down in *Tippets v. Heane*, that, in order to have that effect, the payment must expressly be made in discharge of part of a larger debt, which accrued six years or more before the payment. There is no sufficient evidence that this payment was so made; for though, in a continuous account, items accruing within six years, and items accruing before, may in some sort be said to constitute one debt, yet, when the statute 9 Geo. IV. c. 14, says, that nothing therein contained shall alter or lessen or take away the effect of any payment of principal or interest, it is clear there was, in the view of the Legislature, a distinction between items accruing within, and items accruing before the six years. *Here, as there was no appropriation, nor any evidence of an intention on the part of the debtor to apply the payment in part discharge of one of the earlier items, I think it has not the effect of exempting them from the operation of the statute.

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Then comes the second question; has the plaintiff a right to apply that payment in satisfaction of the prior debt barred by the statute? For, though the plaintiff is bound by the statute with respect to his right to sue the defendant, yet, where the debtor has made no appropriation of the money, the law as to its application remains the same as before.

The civil law, it is said, applies the payment to the more burdensome of two debts, where one is more burdensome than the other; but I do not think that such is the rule of our law. According to the law of England, the debtor may, in the first instance, appropriate the payment; *solvitur in modum solventis*: if he omit to do so, the creditor may make the appropriation; *recipitur in modum recipientis*: but if neither make any appropriation, the law appropriates the payment to the earlier debt. The defendant here contends that, where the creditor fails to make any appropriation at once, the law will appropriate the payment to the more burdensome debt; but the decisions are clearly the other way: thus, in *Goddard v. Cox*, where the defendant, being indebted to the plaintiff for coals delivered to his wife *dum sola*, and to himself after coverture, made a payment without any specific appropriation,

it was held the plaintiff might apply the money to the discharge of the debt contracted by the wife *dum sola*. Then, in *Philpott v. Jones*, where the debt was for goods, and spirits supplied in quantities not amounting to 20s. at a time, for which the plaintiff was precluded from recovering by 24 Geo. II. c. 40, s. 12, the plaintiff was allowed to apply to the spirits an unappropriated *payment made by the debtor: and Lord DENMAN, Ch. J. said he might so apply it at any time. In *Peters v. Anderson*, where a debt was due from the defendant to the plaintiff on a covenant, and a debt on simple contract, and the defendant delivered goods in payment without appropriating them to either debt in particular, it was held that the plaintiff might appropriate them to the debt for which he had the worse security. In *Bosanquet v. Wray* it was held, that a creditor receiving money without any specific appropriation by the debtor might be permitted, in a court of law, to ascribe it to the discharge of a prior and purely equitable debt, and sue him at law for a subsequent legal debt.

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These cases show clearly that the receiver has a right to appropriate, if the payer omit to do so; and *Simson v. Ingham*, that he may make the appropriation at any time before action. Best, J. was the only Judge who said that the appropriation must be made within a reasonable time; but if that were necessary, it has been made within a reasonable time here: and this is not even the case of one debt being more burdensome than another; for, if a debtor wishes to do what is just, there are many cases in which he will not set up the Statute of Limitations as a defence.

I think therefore that the plaintiff is entitled to judgment for 15*l*.

BOSANQUET, J.:

This action is brought for the recovery of a debt, one part of which accrued within six years, and the other more than six years, before the action commenced. *Williams v. Griffiths* is a decisive authority that the account between these parties was not an open account within the meaning of the exception in the Statute of Limitations: and I think the payment of 15*l*. is not such a payment on account as will revive *the plaintiff's claim to the earlier debt. In order to have that effect, it should have been expressly paid on account of such debt; but there is no evidence here of any act by the debtor to show that it was so paid, and therefore I am of opinion the debt which had accrued more than six years before the action, cannot be recovered.

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FOWKES.

A third question however arises, whether the plaintiff may not be taken to have appropriated the payment to the older debt: at the time of the payment, no appropriation was made by either party; but as the debtor made no appropriation, the creditor might appropriate the payment at any time before the action commenced; and he had every motive for applying it to the debt for which he had no remedy at law. In *Bosanquet v. Wray* it was held, that a creditor receiving money without any specific appropriation by the debtor might be permitted, in a court of law, to ascribe his receipt to the discharge of a prior and purely equitable debt, and sue him at law for a subsequent legal debt.

It was not necessary he should manifest the appropriation by any specific act; and, as he had an interest and the right to make the appropriation, I think he is entitled to judgment for 15*l*.

COLTMAN, J.:

It has been argued, that the payment of 15*l*. by the defendant must take the earlier part of the account out of the Statute of Limitations, because the defendant must have known there was a balance against him on that part of the account: and if it were clear he knew that such was the state of the account, it might be so: but there is no evidence that he knew the state of the account; and therefore I think that the payment did not revive the earlier debt.

[*464] Then comes the question whether the plaintiff might not himself apply it to the earlier debt. It is contended *on the authority of *Meggot v. Mills*, and *Dawe v. Holdsworth* (1), that it ought to be applied to the more burdensome of the two debts: but it is sufficient to say that, notwithstanding the doubt expressed by the MASTER OF THE ROLLS in *Clayton's* case, the general current of authorities is the other way, establishing that where the debtor omits to make an appropriation, the creditor may appropriate the payment to the earlier debt: whether he should do that within any limited time, it is not necessary to decide here, because there has been no unreasonable delay; the more correct view, however, seems to be, that the creditor is not limited in point of time. The plaintiff therefore is entitled to judgment for 15*l*.

ERSKINE, J.:

I agree in the opinion which has been pronounced on both

(1) 15 R. R. 595, n. (5 Taunt. 601, n.; 1 Peake, 89).

points. The case of *Tippets v. Heane* shows that, in order, by part payment, to take a debt out of the operation of the statute, the payment should be made on account of that particular debt: the reason is, that the payment is taken as an acknowledgment, and therefore the intention of the party making it is material. Here there were two debts; one for which the debtor could be sued, the other for which he could not; if we look to his intention, the probable inference is, that he meant to apply it to the debt for which he was liable to be sued, and that is the meaning of the cases of *Meggot v. Mills*, and *Dawe v. Holdsworth*. I think therefore that the payment did not restore the plaintiff's right to sue for the older debt.

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FOWKER.

But if the debtor does not expressly apply the payment to the more recent debt, the law gives the creditor the right to apply it to the older: and the creditor would apply it to the older debt for the very reason *which leads the debtor to apply it to the more recent. On this point, therefore, our judgment must be in favour of the plaintiff for 15*l*.

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Judgment for plaintiff accordingly.

HEARSEY v. PECHELL AND OTHERS.

(3 Bing. N. C. 466—469; 8 L. J. (N. S.) C. P. 247; 7 Dowl. P. C. 437; S. C. nom. *Osborne v. Pechell*, 7 Scott, 477; 2 Arn. 25.)

1839.
May 6.

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In an action of trespass against magistrates for turning plaintiff out of a cottage, at the instance of parish officers who claimed the premises as part of the poor-house, the Court refused to call on plaintiff to give security for costs, on the ground that the action had been instigated and encouraged by a third person, who had petitioned the House of Lords on the subject, and had thrown out expressions of a determination to see plaintiff reinstated.

THIS was an action of trespass against certain magistrates, for executing a warrant under which the defendant had been turned out of a cottage in which *he had resided for some years. The warrant had been granted at the instance of the parish officers of Ambersham South, who claimed the cottage as part of the poor-house of the tithing in which it stood; alleged that the plaintiff had occupied it as a pauper by their permission; and extruded him under the provisions of 59 Geo. III. c. 12, s. 24.

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The plaintiff had been much countenanced in the claim he made to the property by Mr. John Webster Wood, who petitioned the House of Lords in his favour, and, upon being there referred to the

HEARSEY
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courts of justice, wrote several letters to the parish officers, in one of which he said, "I will not shrink from any step I may have taken in the affair, and, while trial by jury exists, I fear no one, and, if personally insulted, will spare no expense in my defence: the cause I have considered a public, not a private one:" in another, "If you will send the title-deeds of the cottage, or prove to the satisfaction of Mr. Rodgers that the property belongs to the parish, Hearsey will give no further trouble." He afterwards sent the plaintiff to Rodgers, the attorney who conducted the cause, and said he would see the plaintiff through the House of Lords.

On affidavit of these facts,

Wilde, Serjt., obtained a rule calling on the plaintiff to show cause why proceedings should not be stayed until security for costs should be given, either by the plaintiff or by Mr. Wood.

In *Tenant v. Brown* (1), where, in trespass against parish officers for distraining for poor-rates, it appeared that the plaintiff refused to pay the rate by the desire of his landlord, who was also the attorney in the cause, the Court stayed the proceedings until he gave security for costs.

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Erle and *Knowles* showed cause on affidavits, setting forth the nature of Hearsey's claim, stating that Rodgers was not the attorney of Wood, and had never seen him before Hearsey's action was commenced; and that Wood had no pecuniary interest in the cause, but stirred in it solely on public grounds. The poverty of the plaintiff had been repeatedly held no ground for requiring security for costs: *M'Culloch v. Robinson* (2), *Morgan v. Evans* (3).

In *Tenant v. Brown*, the landlord, who was also the attorney of the plaintiff, had a direct pecuniary interest in the result of the cause, and had stimulated the plaintiff not to pay the rate for which the parish officers distrained on him.

Wilde :

Although Wood has no pecuniary interest, the plaintiff may be called on to give security if this be in effect Wood's action: and that it is such, either from private or public motives, the facts

(1) 5 B. & C. 208.

(2) 2 Bos. & P. (N. R.) 352.

(3) 7 Moore, 344.

disclosed sufficiently evince. It is manifest the house in question belongs to the parish.

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PECHELL.

TINDAL, Ch. J.:

We are not called on to decide whether this house be the property of the plaintiff or of the parish, for, though we may form an opinion of our own from the affidavits, the plaintiff has a right to go before a jury.

The real question is, whether this is the action of the plaintiff, or substantially the action of Mr. Wood.

If it were an action which the plaintiff would not have brought but for the instigation and countenance of Wood, the case would fall within the principle of *Tenant v. Brown*, and another case in the Court of King's Bench, where a master was compelled to pay costs for *his servant, whom he had put forward as a defendant instead of himself. But it is not clear to me that this is an action which the plaintiff would not have brought without the instigation of Wood. There are no doubt expressions of Wood's which lead to such an inference, and which called for an answer: but, after hearing the affidavits on the part of the plaintiff, we think the rule ought to be discharged.

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The rest of the COURT concurring, the rule was

Discharged.

KAY v. MARSHALL AND OTHERS (1).

(5 Bing. N. C. 492—501; S. C. 7 Scott, 548; 2 Arn. 78; 8 L. J. (N. S.) C. P. 261; S. C. in Chancery, 1 Beav. 535; in H. L., see p. 768, below.)

1839.
May 8.

[492]

A patent was taken out in respect of new machinery for preparing flax and improved machinery for spinning flax: the improvement as to spinning consisted in spinning at a shorter reach than had before been practised; but the contraction of the reach was rendered practicable by the maceration of the flax in the new machinery for preparing it; for spinning machines, varying in the distance of the reach, had been in use before: Held, that the patent was void, though the machinery for preparing the flax was new and useful.

THE following case was sent by the MASTER OF THE ROLLS for the opinion of this Court:

About the year 1824, the plaintiff claimed to have found out and

(1) Cited and distinguished in the *house* (C. A. 1886) 20 Ruling Cases, joint judgment of FRY, L. J. and 336, 384.—R. C. BOWEN, L. J. in *Edison, &c. v. Wood-*

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invented a new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances, by power.

The plaintiff thereupon applied for and obtained letters patent, under the Great Seal of Great Britain, dated the 26th of July, in the sixth year of the reign of George the Fourth, whereby, after reciting that the plaintiff had by his petition represented unto his Majesty, that he the plaintiff had found out and invented new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances, by power, which invention he believed would be of much benefit and utility, and that he was the first and true inventor thereof, and that the same had not been made, done, or used by any other person or persons whomsoever to his knowledge or belief; it was thereby declared that his said Majesty did, for himself, his heirs, and successors, give and grant unto the plaintiff, his executors, administrators, and assigns, his Majesty's special licence, that he the plaintiff, his executors, administrators, and assigns, and no others, from time to time, and at all times thereafter during the term of years therein expressed, should and lawfully might make, use, exercise, and vend the said alleged invention, &c.

By a specification under the hand and seal of the plaintiff, dated the 26th of January, 1826, and duly enrolled in his Majesty's Court of Chancery, the plaintiff, within six calendar months next after the date of the said letters patent, did, in pursuance of a proviso for that purpose contained in the said letters patent, particularly set forth, describe, and ascertain the nature of his said alleged invention, and the several parts thereof, and in what manner the same was to be performed; and after setting forth and describing the same, declared that what he claimed as his invention in respect of new machinery for preparing flax, hemp, and other fibrous substances, were the macerating vessels marked (B) in the plan or drawing annexed to the said *specification, and the trough of water marked (C); and that what he claimed as his invention in respect of improved machinery for spinning flax, hemp, and other fibrous substances, was the wooden or other trough marked (D), for holding the rovings when taken from the macerating vessels, and the placing of the retaining rollers *ee* and the drawing rollers *cc* nearer to each other than they had ever before been placed, say, within two and a half inches of each other, for the purpose aforesaid.

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In the language of the specification, the invention was declared to consist of "new machinery for macerating flax and other similar fibrous substances previous to drawing and spinning it, which is

called the preparing it; and also for improved machinery for spinning the same after having been so prepared:" and the patentee, in describing the improved machinery for spinning, said, "that he placed the drawing rollers only two and a half inches from the retaining rollers, and that this constituted the principal improvement in the said spinning machinery." Then he proceeded to assign the reason and principle upon which the alleged improvement rested, and in a later part of his specification, (when stating the extent of what he claimed as his own invention in respect of improved machinery for spinning flax,) he described it to be, the wooden and other trough for holding the roving taken from the macerating vessels, "and the placing of the retaining rollers and the drawing rollers nearer to each other than they had ever before been placed, say, within two and a half inches of each other, for the purpose aforesaid."

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On the 2nd of June, 1836, a trial was directed by the MASTER OF THE ROLLS upon two issues, viz.,

First, whether the plaintiff had, before and at the time of the making of the said letters patent, found out *and invented any new and improved machinery, as in the letters patent and specification was alleged;

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And secondly, whether the said alleged invention in the said letters patent and specification mentioned, was, before and at the time of making of the said letters patent, of much or any public benefit or utility, as in the said letters patent was alleged;

And the Judge who tried the said cause was to be at liberty to indorse special matter on the *postea* as he should think fit.

The issues were tried at the York Assizes, 1836, before Parke, B., and a verdict was found for the plaintiff on both issues, with the following indorsement on the *postea*:—that, before the granting of the patent, flax, hemp, and other fibrous substances were spun with machines with slides, by which the reach was varied according to the length of the staple or fibre of the article to be spun, and that that had been a fundamental principle of dry spinning known and used before the granting of the patent, the reach having varied in cotton spinning between $\frac{7}{8}$ ths of an inch and $1\frac{1}{2}$ inch; in flax or line spinning, from 14 to 36 inches; tow spinning, from 4 to 9 inches; worsted spinning, from 5 to 14 inches. Before the granting of the patent, it was not known that flax could be spun by means of maceration, as having a short fibre at a reach of $2\frac{1}{2}$ inches, or about those limits. But before that time Horace Hall had taken out a patent for the application of moisture in spinning flax, to

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separate the fibres and reduce the length of the staple, and the machines manufactured according to that patent were constructed with the reach of $4\frac{3}{4}$ inches.

The question for the opinion of the Court was, whether the plaintiff's patent was valid in point of law.

The case was argued in Hilary Term.

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Sir F. Pollock, for the plaintiff, relied on the finding of the jury on the issues, whether the plaintiff had invented new machinery, and whether the invention was of public utility. The indorsement on the *postea* did not detract from the effect of that finding; for though the reach of machines had varied in dry spinning before the plaintiff's invention, yet his process for macerating was new, and was rendered useful by being connected with machinery which spun the macerated materials at a shorter reach than had ever been applied to flax.

The indorsement on the *postea*, however, could not be applied to the question which the Court was called on to decide; namely, whether the patent was void on the face of it. And there was nothing on the face of it to affect its validity; for admitting that the principle of a varying reach in spinning machinery was known before, the application of that principle, in combination with the new macerating process, would not destroy the plaintiff's right to a patent: if the case were otherwise, no patent could be supported, for there was none in which the inventor did not apply old principles to new modifications of machinery. Thus, Bramah's hydraulic press was founded on the principle of the hydrostatic paradox, with which all the world was acquainted before the invention of the press.

Sir W. W. Follett for the defendants :

If a patent be taken out for two processes, one of which is not new, the patent is void, notwithstanding the other process be new and useful: *Brunton v. Hawkes* (1), *Boulton v. Bull* (2). Upon analysing the plaintiff's patent, it will be clear that it has been taken out for two distinct processes: one, for preparing flax by maceration; the other, for spinning the flax so prepared. *In the machinery for spinning the flax, the only novelty alleged is the reducing the reach to two inches and a half: but the practice of varying the reach according to the length of fibre to be spun, must be taken to have been known before; for the indorsement on the

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(1) 23 R. R. 382 (4 B. & Ald. 541).

(2) 3 R. R. 439 (2 H. Bl. 463).

postea is to be read in connection with the finding on the issues, and constitutes, with that finding, a special verdict. The plaintiff, therefore, by the second part of his patent, seeks to appropriate to himself the application of spinning machinery to fibres which, by his macerating process, he has reduced to two inches and a half: if this were allowed, manufacturers would be precluded from varying the reach of their machines, as they have always done before; and, according to the plaintiff's argument, if a fibre were discovered in nature shorter than two inches and a half, neither the plaintiff nor any other could be permitted to contract the reach of their spinning machines accordingly. The patent, therefore, is void for seeking to appropriate to the plaintiff, in connection with his own discovery, the application of a principle which was known before and practised by others.

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Sir F. Pollock, in reply, insisted that what the defendants attempted to divide into two distinct processes, were only parts of one entire and continued operation. The plaintiff's machinery, by maceration of the fibres and contraction of the reach, could spin flax at a distance of only two inches and a half between the rollers. No one could do that before, for flax cannot be spun by a cotton machine; and the jury having found that the invention was new and useful, there was nothing on the face of the patent to render it void.

(Several other points were discussed in argument, but the decision of the COURT turned only on this.)

Cur. adv. vult.

TINDAL, Ch. J.:

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In this case, which has been sent to this Court by his Honour the MASTER OF THE ROLLS, the question as to the validity of the patent has been argued before us, upon various grounds of objection; and, consequently, a certificate in the general terms of the question, that the patent does not appear to us to be valid in point of law, could not give satisfaction to the Court from which the question was sent. We therefore proceed shortly to state the ground upon which our opinion is formed, that the patent in question is not valid in law.

The patent is taken out for "a new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances, by power;" and the invention is declared, in the specification, to consist of "new machinery for macerating flax and other similar fibrous substances previous to drawing and spinning it, which is

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called the preparing it; and also for improved machinery for spinning the same, after having been so prepared."

Now, although the first part of the invention described in the patent, viz. the new machinery for macerating, appears from the facts stated in the case to be a proper subject for a patent, both with regard to the invention thereof being original, and in all other respects, yet the latter part of the patent, viz. the improved machinery for spinning flax, &c., does not, upon the facts stated in the case and the description of the invention contained in the specification, appear to us to be a subject upon which a patent can by law be taken out.

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The patentee, in describing the improved machinery for spinning, which constitutes one part of his patent, informs the public, "that he places the drawing rollers only two and a half inches from the retaining rollers, and that this constitutes the principal improvement in the said spinning machinery." And he then proceeds *to assign the reason and principle upon which the alleged improvement rests. And in a later part of his specification (when stating the extent of what he claims as his own invention in respect of improved machinery for spinning flax), he describes it to be, the wooden or other trough for holding the roving when taken from the macerating vessels, "and the placing of the retaining rollers and the drawing rollers nearer to each other than they have ever before been placed, say within two and a half inches of each other, for the purpose aforesaid." So that, looking at the whole of the specification, it is not the use of the wooden or other trough as used by him, upon which he relies, as indeed it obviously could not be, as an important invention, nor as the proper subject of a patent; but it is "the placing and retaining of the respective rollers within two and a half inches from each other," that forms the real subject-matter of the patent for the improved machinery.

Now, whether a patent can by law be taken out for placing the retaining rollers and the drawing rollers of a spinning machine (which machine itself was known and in use before), within two inches and a half of each other, under the circumstances stated in the case, is the real question between the parties: and we think it cannot. For it appears from the indorsement upon the *postea*, that before the granting of this patent, flax and other fibrous substances were spun with machines by which the reach was varied according to the staple or fibre of the article to be spun, and that that had been a fundamental principle of dry spinning known and used

before the granting of this patent ; and further, that the reach used in cotton spinning had been less than two inches and a half. The application, therefore, of a reach of two inches and a half to the spinning of flax, when in a state of maceration, by which the fibre of flax will not hold together beyond *two inches and a half, does not appear to us to be any new invention or discovery, but is merely the application of a piece of machinery already known and in use, to the new macerated state of the flax. The fundamental principle of dry spinning was, that the reach varied according to the length of the staple or fibre of the article to be spun ; and spinning machines were in use, either with the reaches fixed, or connected with slides, so that their distance might be varied, according to the length of the fibre of the article intended to be spun ; and, consequently, there is nothing new in applying the use of a spinning machine with a reach of such a degree of shortness, as would suit the continuity of the roving of the flax after it is macerated.

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It is to be remarked, that the application of moisture in spinning flax, for the purpose of separating the fibres and reducing the length of the staple, was not new in practice, and had been resorted to under Hall's patent, though in a different manner from that employed upon this occasion. Now, suppose a patent to have been first obtained for some entirely new method, either chemical or mechanical, of reducing the fibres of flax to a short staple, we think that a second patent could not be taken out for an improved mode of machinery in spinning flax, which consisted of nothing more than the spinning of the short staple of flax by a spinning machine with a reach of a given length, not less than that already in use for the spinning of cotton ; the effect of which would be, to prevent the first patentee from working his invention with the old machine at the proper reach. And if a patent taken out for that object separately would be invalid, so also a patent taken out for an invention consisting of two distinct parts, one of which is that precise object, would be void also.

The answer given to this objection on the part of the plaintiff has been, that the invention for which the *patent has been taken out, does not consist of two distinct parts, but has but one entire single object only ; namely, the object of macerating and spinning that macerated flax, on a machine where the rollers are retained at the prescribed distance from each other. But this appears to be at variance with the specification itself, which divides the invention,

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and the subject-matter of the patent, into two distinct parts; and even if it is to be considered as one entire invention, if part of what is claimed is not properly the subject of a patent, or not new, the whole must be void.

We shall therefore certify to his Honour that, in our judgment, the patent in question is not valid in law.

[The case having come before Lord LANGDALE, M.R., on the equity reserved upon the certificate returned as above by the Judges of the Court of Common Pleas, his Lordship, after observing that, although the question before him was the same as that which was before the Judges, the decision to be pronounced in the Court of Chancery must rest on his responsibility, and not on the responsibility of the learned Judges whose assistance he had asked and received, proceeded as follows:]

1889.
July 10.
[1 Beav.
536]

The patent was granted for new and improved machinery, for preparing and spinning flax, hemp and other fibrous substances, by power; and in the specification the plaintiff declares the nature of his invention to consist in new machinery for macerating flax and other similar fibrous substances, previously to drawing and spinning it; and also in improved machinery for spinning the same, after having been so prepared.

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Nothing has occurred to show, that the plaintiff's machinery for macerating flax, previously to drawing and spinning it, was not new at the time when the patent was granted, and nothing has occurred to show, that previously to the grant it was known, that maceration to the extent proposed by the plaintiff, was not a *new process by which flax was usefully prepared for drawing and spinning it; and so far as relates to the maceration described in the patent, no question is made as to the novelty and utility of the plaintiff's invention; and if this were all, the validity of the patent would not be affected by the fact, that before the grant a mode of preparing the flax for spinning, by moistening it, had been invented by Horace Hall, or that, subsequently to the grant, a more convenient and efficient mode of maceration had been invented and come into general use. But with respect to the improved machinery for spinning, the plaintiff, in his specification says, "I place the drawing rollers only two inches and a half from the retaining rollers, and this constitutes the principal improvement in the said spinning machinery: for the roving being so completely macerated, would not hold together to be drawn out, while in such a state, to the

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ordinary length of the staple, but this very state, when drawn in so short a length, as here represented, enables it to be spun very fine and evenly ; for it should be stated that there is no elasticity in the fibre of flax, hemp, nettledweed or other the like substances ; but when drawn by rollers so placed as aforesaid, and moving at the relative speed aforesaid (which he has previously described as being eight to one), and in the completely saturated state aforesaid, the fibres themselves are pulled asunder and require to be twisted immediately, or the continuity of the thread would be destroyed." And, again, in specifying his claim, he declares that which he claims as his invention in respect of improved machinery for spinning flax, hemp and other fibrous substances, is a certain trough, which he has described, and the placing of the retaining rollers and the drawing rollers nearer to each other than they have ever before been placed (say within two inches and a half of each other) for the purpose aforesaid.

From this specification, it appears to have been known to the plaintiff, that the fibres which were to be spun after maceration, would be pulled asunder by drawing in his manner, and required to be twisted immediately to prevent the continuity of the thread being destroyed, and that, therefore, he placed the drawing and retaining rollers very near to each other.

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He has declared that this placing of the rollers constitutes the principal improvement in the spinning machinery ; and amongst the things which he claims as his invention, is this placing of the rollers nearer to each other than they had ever before been placed (say two inches and a half off each other) for the purpose aforesaid. And it is endorsed upon the *postea* by the learned Judge, before whom the issue was tried, that before the granting of the patent it was not known that flax could be spun by means of maceration, as having a short fibre at a reach of two inches and a half.

But various sorts of spinning machines were, before the grant of the patent, used with slides, by which the reach was varied according to the length of the staple or fibre ; for cotton-spinning the reach varied from seven eighths of an inch to an inch and a quarter ; for tow-spinning, from four to nine inches ; for worsted-spinning, from five to fourteen inches ; and for dry flax-spinning, from fourteen to thirty-six inches : so that machinery, by which the reach was varied from less than an inch to thirty-six inches, was known before the patent was granted.

The plaintiff has found that a reach of two inches and a half,

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or thereabouts, is well adapted for spinning flax prepared for spinning by his process of maceration, and the question is reduced to this, whether his adopting *that particular length of reach, for the purpose of applying it to the spinning of flax so prepared, is to be considered an improved machinery in respect of which this patent can be held to be valid, and I am of opinion that it cannot.

I concur entirely with the learned Judges, and see no reason to think that any other result would follow from further investigation.

Being of opinion that the patent is invalid, it follows that the bill must be dismissed. I have considered the question of costs, and I think that I ought to make no order with respect to the costs of the issue; but the plaintiff must pay the costs of this suit and of the case.

IN THE HOUSE OF LORDS.

(8 Clark & Fennelly, 245—261; S. C. West, 682; 5 Jur. 1028.)

[An appeal having been made to the House of Lords against the last-mentioned order of the MASTER OF THE ROLLS, and certain previous orders, and having been argued, the following opinions were delivered:]

1841.
June 18.
[8 Cl. & Fin.
256]

THE LORD CHANCELLOR:

In this case the plaintiff complains of the defendants having infringed his patent, and of the course which has been taken below; one, certainly, not of very ordinary occurrence, as your Lordships will see when I call your attention to the mode in which the case was disposed of in the course of the proceedings. The bill sets forth the letters-patent and specification, and states that the invention was in respect of machinery for preparing and spinning flax, hemp, and other fibrous substances. It states the specification, and then states that the first *process, namely, that of macerating the flax, had to a considerable degree become unnecessary. It then complains of what the defendants have done, not as interfering with the plaintiff's patent as regards the preparing of the flax for spinning, but as having invaded his patent so far as it was for an improved machinery for drawing and spinning flax; which machinery for drawing and spinning flax is stated to have been in use, and very generally adopted. That is the complaint made by the bill, to which the defendants pleaded, and by their pleas thus raised two objections to the plaintiff's title. The first objection was, "That

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the plaintiff had not before, and at the time of the making of the letters-patent in the bill mentioned, found out and invented any new and improved machinery, as in the said bill of complaint, and in the said letters-patent and specification, is alleged." That objection therefore was, that the patent was bad, because the invention described in the letters-patent and specification was not new, that there was not any novelty in it; alluding to the rule of law, that if any part of that which is claimed as a new invention, was not in fact new, the patent would be bad. First of all, upon the construction of this plea, I cannot entertain a doubt that the terms "any new and improved machinery, as in the said bill of complaint and the said letters-patent and specification is alleged," are to be construed as meaning any such machinery as is there alleged, and in respect of which the patent is claimed: but I apprehend that that does not now come before your Lordships for decision.

The two pleas having been set down for argument, an issue was directed, which was afterwards tried. No judgment was pronounced on the validity of the pleas, the parties having, although it is not expressed in *terms in the order, thought it expedient to proceed to the trial of the truth of the pleas, not obtaining or asking the judgment of the Court as to the legality of the pleas, and as to how far they raised the important fact. They proceeded to a trial accordingly, and on the trial the jury found in favour of the novelty and of the usefulness of the invention; but there was an indorsement on the *postea*, which stated (His Lordship read the indorsement, as before stated, p. 761, *ante* :) Now that indorsement, which is to be taken as part of the information which the Court was to act upon as ascertained before the jury, states the various distances at which the rollers were placed in the ordinary spinning machines, and states as a fact, which cannot now be in dispute, "that before the granting of the patent, flax, hemp, and other fibrous substances were spun with machines with slides, by which the reach was varied according to the length of the staple or fibre of the article to be spun." We have it therefore as a fact, now to be assumed as true, that spinning machines were constructed with rollers, the distances between which varied according to the substance to be spun.

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Now all the variation which the plaintiff introduced into the ordinary spinning machine, which he claims as his invention, is fixing the rollers at $2\frac{1}{2}$ inches distance from each other; and that

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he states is such an improvement to the ordinary spinning machine as entitles him to be protected from all the rest of the world, against their using spinning machines with the rollers at that distance. It is not, as was argued at the Bar, one invention, namely, the macerating the flax, and using the flax so macerated, with a particular machine. The earlier part of the invention he not only does not claim as against the defendants, but does not complain of the defendants as having *used that, which, in point of fact, it is quite clear they did not so use; and in point of fact, it is quite clear that he has not adopted that mode. Another mode has been adopted of macerating the flax, and the flax so macerated by another process has been used in a machine with rollers at the distance of $2\frac{1}{2}$ inches.

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If the patent be good so far as the spinning machine is concerned, that is to say, if the plaintiff has a right to tell the defendants and all the rest of the world that they shall not use the common spinning machine with rollers at $2\frac{1}{2}$ inches distance, then the existence of the patent deprives the defendants and all the rest of the world of the right of using the ordinary spinning machine in the form in which they had a right to use it before the patent was granted. That is not the object of the patent: if he has discovered any means of using the spinning machine which the world had not known before, the benefit of that he has a right to secure to himself by means of a patent; but if this mode of using the spinning machine was known before—and the indorsement upon the *postea* states that it was known before—then the plaintiff cannot deprive them of having the benefit of that which they enjoyed before. The indorsement on the *postea*, stating that the rollers had been used at a variety of distances (not precisely specifying $2\frac{1}{2}$ inches, but stating that the distances had been made to vary according to the length of the fibre to be spun), appears to me to establish a fact which is of itself conclusive against the plaintiff. Some question was raised at the Bar as to whether the effect of the maceration was to shorten the fibre: there is no very distinct evidence on the subject, but upon referring to what has taken place in the Court below, it does not appear that any doubt existed that the effect of the maceration was to detach *one fibre from another; the substance consisting of a variety of fibres of the length of $2\frac{1}{2}$ inches each, which, when combined, constituted a compound fibre of considerable length, but when detached by means of maceration by the application of moisture, then each individual fibre was reduced to the length of $2\frac{1}{2}$ inches. It does not appear to me, however, that this case can

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depend upon this circumstance, because the real use of the spinning machine, before that process of maceration was introduced, was this,—a machine for spinning with rollers at any distance at the option of the party using it, or according to the substance to be spun; and any substance might be spun that was capable of being so spun, with rollers at $2\frac{1}{2}$ inches distance, because the fibre was of that length, or for any other reason; that is quite immaterial. The question is, whether it is an innovation the placing the rollers at $2\frac{1}{2}$ inches distance from each other: but by the indorsement on the *postea*, we are told that the distance between the rollers varied according to the length of the fibre of the substance to be spun. Under these circumstances, the case now being reduced simply to the question whether the construction proposed by the patent is an improvement of the spinning machine, it appears to me that the judgment of the Court of Common Pleas is well founded, confined as it is now to that point; and that such a patent is not valid in point of law. Some objection was made to the course which was adopted in sending the case; that is to say, to the terms in which the case was sent. It appears there is no question that the parties below were willing to adopt the terms proposed, in order to put an end to the litigation; and that the Court therefore sent a case embracing the right of the parties, namely, the validity of the patent, confined to the particular point *raised. That of itself would be an answer to the objection now made to the form in which the case was sent; because this House will not permit parties, upon appeal, to raise an objection which they did not think proper to raise before, and on which they did not obtain the judgment of the Court below.

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But even independently of that consideration, although the terms of the question for the Court of Common Pleas are as to the validity of the patent, you must take the whole case together: you have the facts stated which raise the objections to the validity of the patent, which are contained in the pleas; and these facts are confined to the question of novelty, and to the question of usefulness. In point of fact, therefore, although the terms in which the question is couched are larger than the plea, it is the very same question which was raised before his Lordship the Master of the Rolls,—and that was the question on which the judgment of the Court of Common Pleas was pronounced. It does nothing more than establish this proposition, that the objection taken to the patent, namely, that it was not new and not useful (novelty is the question rather on which

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it turned), is a good objection; and that the patentee has failed to show that that for which alone he has claimed the patent is any novelty, and entitles him to the benefit of a patent.

Lord BROUGHAM concurred.

Ordered, that the appeal be

Dismissed, with costs, and that the orders and proceedings complained of be affirmed.

1839.

May 8.

[5 Bing. N. C.
501]

IZON v. GORTON AND ANOTHER (1).

(5 Bing. N. C. 501—507; S. C. 7 Scott, 537; 2 Arn. 39; 8 L. J. (N. S.) C. P. 272; 3 Jur. 653.)

Defendants, as tenants from year to year, occupied a second floor, which, during their occupation, was consumed by an accidental fire: Held, that, notwithstanding the destruction of the premises, they were liable to an action for use and occupation for the period which elapsed between the fire and the regular determination of their tenancy.

THE first count of the declaration was, for the use and occupation of certain rooms, apartments, and premises of the plaintiff; the second, for money due from the defendants to the plaintiff, on an account stated.

The defendants pleaded *non assumpsit*, except as to ten guineas, and as to that, a tender and payment into Court.

At the trial before Tindal, Ch. J., a verdict was found for the plaintiff for 109*l.* 10*s.*, being the amount claimed, after deducting the sum tendered and paid into Court, subject to the opinion of the Court upon the following case:

The plaintiff was lessee for a term of years of a warehouse in the city of London, and occupied the ground floor and cellar in his trade of an ironmonger.

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On the 23rd of August, 1830, the defendants entered into the occupation of the two upper floors of the warehouse as under-tenants to the plaintiff, at a rent of 80*l.* per annum, which was paid quarterly on the usual quarter days, and continued in the actual occupation of such rooms, by using them as a warehouse for hops, from that time until the 12th of November, 1834, when the floors were consumed by fire. During their occupation, the roof, which was the only covering to the upper floor occupied by the defendants,

(1) *Marshall v. Schofield* (1883) 52 L. J. Q. B. 58.

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was occasionally repaired by the plaintiff when repair was necessary. There was a crane and jib on the upper floor occupied by the defendants, used for the purpose of raising goods to the defendants' rooms, and also used by the plaintiff when he had occasion. That crane and jib were also repaired by the plaintiff at the instance of the defendants, who on one occasion refused to pay their rent until such repairs were done. The plaintiff also paid all rates and taxes.

On the 12th of November, 1834, a fire accidentally broke out in the night, in the rooms occupied by the defendants, by which the whole of their stock was destroyed, and the rooms were so damaged that they became altogether untenable. The plaintiff had insured the whole house, of which the rooms in question were part. From the time of the fire, there was no occupation in fact by the defendants of the premises, and no interference with them for any purpose. The plaintiff, after some delay, proceeded to repair the premises, and apprised the defendants that the rooms were ready for use and occupation by the 4th of June, 1835. The defendants, however, declined to occupy the premises or to pay any rent subsequently to the fire, and the plaintiff let the premises to another tenant at Lady Day, 1836, by consent of the defendants.

The question for the opinion of the Court was, whether *under the circumstances above stated, the plaintiff was entitled to recover from the defendants, for the use and occupation of the rooms and premises in question, for the period that elapsed between the 12th of November, 1834, when the fire happened, and the 25th of March, 1836. If the Court should be of opinion that the plaintiff was entitled to recover for the use and occupation of the said rooms, for the whole of the last-mentioned period, then the verdict was to stand for the sum of 109*l.* 10*s.* And if the Court should be of opinion that the plaintiff was entitled to recover from the defendants for the use and occupation of the said rooms and premises for any part of the last-mentioned period, the judgment was to be entered up for the plaintiff, for a sum estimated at the rate of 80*l.* a year, and in proportion to the period for which the Court should think the plaintiff so entitled to recover: but if the Court should be of opinion that the plaintiff was not entitled to recover from the defendants, for any part of the period last aforesaid, then a verdict was to be entered for the defendants, or a nonsuit, as the Court might direct.

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The case was argued in Hilary Term by

Peacock for the plaintiff:

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The defendants were tenants from year to year: the fire did not determine their interest: *Brown v. Quilter* (1): and during their tenancy they are liable to pay for the use and occupation. If they had entered into an agreement or covenant to pay rent, there could be no doubt of their liability: in *Baker v. Holtzaffell* (2), it was held that the landlord of premises, demised under a written agreement, might recover against his tenant, in an action for use and occupation, the rent accruing after the premises were *burnt down, and no longer inhabited by the tenant: and there is, in effect, no difference between an actual agreement to pay rent, and an implied agreement to pay for use and occupation. In *Grimman v. Legge* (3), where it was held the action did not lie, the rent claimed never was due, for the tenant gave up possession, and the landlord resumed it in the middle of a quarter; and there was an agreement that the rent should be payable quarterly. Before the statute 6 Ann. c. 31, s. 6, the tenant would have been liable for permissive waste; note 7 to *Pomfret v. Ricraft* (4): and there is nothing in the statute to relieve him from liability to rent.

Tomlinson for the defendants:

Upon a covenant or written agreement the tenant would have been liable to pay rent by his express contract: and if the plaintiff had declared specially against the defendants as tenants from year to year, it might have been necessary to consider whether or not a tenant from year to year is, as such, liable to rent, under circumstances such as the present. But this is an action for use and occupation; and to entitle the plaintiff to recover, there must have been an occupation in fact, or a use. The principle is explained in *Naish v. Tatlock* (5): the landlord does not recover a rent, but an equivalent for the use of the premises. Thus, in *Whitehead v. Clifford* (6), where the landlord in the middle of a quarter accepted from his tenant the key of a house demised, under a parol agreement that upon her then giving up the possession, the rent should cease, and she never afterwards occupied the premises, it was held that he could not recover, in an action for the use and occupation

(1) *Ambler*, 619.

(2) 13 R. R. 556 (4 Taunt. 45).

(3) 32 R. R. 398 (8 B. & C. 324).

(4) 1 Wms. Saund. 323 b.

(5) 3 R. R. 384 (2 H. Bl. 319).

(6) 15 R. R. 579 (5 Taunt. 518).

of the house for the time subsequent to his accepting the key. So, in *Richardson v. Hall* (1), it was held that the husband *was not liable, in an action for use and occupation, to pay for the enjoyment of a house by his wife *dum sola*. In *Nation v. Tozer* (2) PARKE, B. says, "In order to support this action for use and occupation, it is necessary that the land should have been occupied by the defendant, his agents, or under-tenants, during the time for which the compensation is claimed for use and occupation, though it need not have been beneficially, or even actually, so engaged; but the defendant might have taken possession, and continued to have the right of actual occupation, whenever he pleased to take it." *Baker v. Holtzaffell* and *How v. Kennett* (3) were demises of an entire house, where, when the house was destroyed, the tenancy of the land remained. This is rather the case of a lodging, where, after the fire, there was nothing to occupy. And the entry of the landlord to rebuild was in the nature of an eviction.

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Peacock, in reply :

Where there is no actual agreement for rent, the action for use and occupation lies as long as the tenant's interest subsists; and his interest is not destroyed by the effect of a fire. One who has a freehold in the upper part of a house may have a writ for repairing the lower rooms if the house be burnt down: *Fitz. N. B.* 127 b; 14 Vin. Abr. 321.

Cur. adv. vult.

TINDAL, Ch. J. :

The defendants in this case being tenants from year to year to the plaintiff of the upper floors of a warehouse, at a rent payable quarterly, a fire broke out in the defendants' rooms accidentally, in the middle of a quarter; by means of which the floors were consumed, and the defendants' rooms so damaged that they became altogether untenable until the plaintiff *had completed their repairs after about seven months' interval from the time of the fire.

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Two questions have arisen between the parties upon this state of facts; viz., first, whether the defendants are liable to the payment of any, and what rent, after the termination of the quarter which was current at the time of the fire (up to the end of which quarter the rent has been paid into Court); and secondly, if liable

(1) 1 Brod. & B. 50.

(3) 3 Ad. & El. 659.

(2) 1 Cr. M. & R. 172.

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to rent at all, whether it can be recovered in an action for use and occupation.

Upon the first point, we can see no legal ground for holding that the relation of landlord and tenant between these parties was determined by the consumption of the premises by fire. If there had been an agreement in writing between the parties for a term of years, no question could have been made, but that the term of years still existed; and a tenancy from year to year, until it is determined by a notice to quit, is, as to its legal character and consequences, the same as a term for years: upon the facts stated in this case it must stand admitted, that the tenancy was not determined by any regular notice to quit: and the case of *Baker v. Holtzaffell* is a direct authority, that a tenancy for a term, under an agreement, not being an instrument under seal, is not determined by a fire during the continuance of the tenancy. We think, therefore, the defendants continued tenants to the plaintiff until such tenancy was put an end to by the plaintiff's letting of the premises to a stranger, viz. at Lady Day, 1836, and that they are liable to rent up to that day.

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The remaining question is, whether the defendants are liable in this form of action. The statute 11 Geo. II. c. 19, enables landlords "to recover a reasonable satisfaction for lands, &c. held or occupied by the defendant in an action on the case, for the use and occupation of what was so held or enjoyed;" from which it seems to *follow, that if there is an actual holding, and the power to occupy or enjoy is given by the landlord to the tenant, so far as depends on the landlord, the action is maintainable. Here, nothing was done by the landlord to take away the continuance of the occupation or enjoyment by the tenant: for it would, as it appears to us, be unreasonable to hold that the landlord's act in replacing the floor, and repairing the walls of the defendants' rooms, amounted to an eviction: and though in the case above cited, where it was held that the action for use and occupation would lie, some stress was placed by the Court upon the fact, that the land was still in existence and there was no offer on the part of the defendant to give it up; so it might be argued in the present case; the space enclosed by the four walls, still continued as marked out by them. If the landlord rebuilds, and the tenant chooses to re-enter and to continue his occupation of the new building, there seems nothing to prevent him, as no notice to quit had been given on either side; and if so, the obligation of each

of the parties must be reciprocal, and the tenant must make satisfaction for the rent. The cases referred to in the argument, in which the tenant has been allowed to withdraw himself from the tenancy, and to refuse payment of rent, will be found to be cases where there has been either error or fraudulent misdescription of the premises which were the subject of the letting, or where the premises have been found to be uninhabitable by the wrongful act or default of the landlord himself; neither of which circumstances occur in this case.

Upon the whole, we think the plaintiff is intitled to judgment for 109*l.* 10*s.*

Judgment for plaintiff.

JACKSON *v.* NICHOL AND ANOTHER (1).

(5 Bing. N. C. 508—519; S. C. 7 Scott, 577; 8 L. J. (N. S.) C. P. 294.)

M. purchased lead of plaintiff at Newcastle without specifying any place of delivery: after a time M. desired that it should be forwarded to him in London, and plaintiff gave M.'s agent at Newcastle an order on plaintiff's servant for its delivery: the agent indorsed the order to a keelman, who received the lead and put it on board a vessel for London; the vessel arrived in London on the 21st of June, and defendants, as wharfingers, undertook the delivery of the lead: M. failed on that day: on the 23rd and 24th M. demanded the lead of the captain of the vessel, who refused to deliver it, though the freight was tendered, alleging that defendants had stopped it on account of the failure of M. On the 28th a letter arrived from plaintiff ordering the lead to be stopped *in transitu*: it was then on board a lighter belonging to defendants: Held, that the *transitus* was not at an end, and that plaintiff was in time to stop the lead.

THIS was an action of trover, for the recovery of the value of 284 cwt. 18 lbs. of lead. The defendants' plea denied the plaintiff's property in the lead, and thereupon issue was joined.

At the trial before Tindal, Ch. J., a verdict was found for the plaintiff for 304*l.* 9*s.* 2*d.*, subject to the opinion of the Court upon the following case:

On the 12th of October, 1836, Joseph Crawhall, a merchant at Newcastle-upon-Tyne, as agent of Maltby & Co., then carrying on the business of lead merchants and patent shot manufacturers in London, contracted with the plaintiff for the purchase of from 35 to 40 tons of old lead, at the price of 22*l.* 10*s.* per fodder of 21 cwt., payable by a bill at six months from time of delivery.

For some years previous to the purchase, Crawhall had acted

(1) Sale of Goods Act, 1893, s. 45; 615; *Lyons v. Hoffnung* (1890) 15 *Bethell v. Clark* (1887) 19 Q. B. D. 553, App. Ca. 391.
561, per Cave J., in C. A. 20 Q. B. Div.

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as agent for Maltby & Co. in the purchase and shipping of lead on their account, and had shipped for them largely to Russia, France, and Holland, as well as to London. His general course of dealing as to shipping the lead was, after he had so purchased the lead, to hold it in his possession until he received directions from Maltby & Co. to ship it.

On the 12th of October, 1836, Crawhall advised Maltby & Co. of the present purchase, and stated that the delivery would be in a month or two.

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On the 4th of November, 1836, Maltby & Co. addressed Crawhall at Newcastle-upon-Tyne, in a letter as follows: "We shall be glad if you will inform us when the old lead purchased some time since will be forwarded, for the price declining as it has done, may render further delay in the delivery detrimental to us."

Crawhall had no direction about sending the lead to London except the above; neither had he any instructions to send it any where when he bought it.

The lead remained in the possession of the plaintiff at some copperas works, about two miles distant from Newcastle, without any orders or directions from Maltby & Co. or Crawhall, from the time of the purchase until the 5th of January, 1837, when, at the request of Crawhall, the plaintiff addressed the following order to John Johnson, one of the plaintiff's workmen at the copperas works, directing him to deliver the lead to the order of Crawhall, viz: "JOHN JOHNSON, Dentshole Copperas Works: Deliver to the order of Mr. Joseph Crawhall the old lead." And on the 7th of January, 1837, Crawhall by his clerk, George Backhouse, made the following order in writing for the delivery of the lead, immediately below the above order: "Deliver the above to the bearer to go on board the *Esk*, and furnish me with the particulars as early as possible."

The above orders were delivered by Backhouse to Nichol & Co., of Newcastle, who were wharfingers there and owners of the *Esk*, a trader between Newcastle and London.

On the 9th of January, 1837, Nichol & Co. gave the above delivery orders to a keelman, to go for the lead, and take it on board the *Esk*. The keelman got the lead on that day, and took it on board the *Esk* accordingly, and was paid for so doing by one of the firm of Nichol & Co., who charged the same to Crawhall, by whom they were repaid; and Crawhall charged the same to Maltby & Co.

On the same 9th of January, the plaintiff sent to Crawhall the following invoices:

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“Messrs. MALTBY & Co.

Dr. to C. F. Jackson.

			Cwt. qr. lb.
To 215 pieces of old lead, weighing	-	-	294 2 21
Deduct tare 4lbs. per ton	-	-	10 2 3
			<hr/> 284 0 18

Fodders.

13 11 18 at 22l. 10s. per fodder, of cwt. 21 - £804 9 2.”

On the 14th of January, 1837, Crawhall sent to Maltby & Co., a bill of lading of that and other lead, which bill of lading was signed Nichol & Co. for the captain of the *Esk*, by whom the lead was to be delivered to the order of Maltby & Co., they paying for freight as customary, with average accustomed.

The bill of lading was filled up by Backhouse, the clerk of Crawhall.

The *Esk* arrived at her moorings off the Tower of London with the lead and a general cargo on board, on the 21st of January, 1837. The lead could not have been unloaded before the 24th of that month. The ship did not deliver her cargo at any wharf, but, as on former occasions, delivered in the stream, a wharfinger undertaking the management of her delivery: in that instance the defendants, who were wharfingers, by Maltby & Co.’s orders, undertook the delivery.

Maltby & Co. stopped payment on the 21st of January, 1837.

On the 23rd of January, 1837, Fishwick, the managing clerk of Maltby & Co., on their behalf made out an order for the captain of the *Esk* to deliver the lead for Maltby & Co., on board a lighter, and on the *next day, Fishwick produced the bill of lading and the order, to the mate on board the *Esk*, the captain not then being on board, tendered the freight, and requested the delivery of the lead accordingly; but the mate said he could not deliver it because the delivery had been stopped: and as far as Fishwick recollected, the mate said it was stopped by the defendants.

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On the 24th of January, 1837, Fishwick served upon the mate on board the *Esk*, and also upon the defendants, a demand of delivery of the lead, and at the time of such service produced the bill of lading and tendered the freight; but the parties refused to deliver the lead on account of the stoppage of payment by Maltby & Co.

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On the 24th of January, Bootock, the foreman to a lighterman, went in his barge by the direction of Maltby & Co., alongside the *Esk*, to receive the lead; saw the mate, and asked him if he had not on board some lead of Maltby & Co.; the mate answered that he had lead on board for them, but that he could not deliver it, as it was stopped by the defendants.

On the 26th of January, the plaintiff, hearing of the stoppage of payment of Maltby & Co., and not having been paid the price of the lead, applied to his attorney, at Newcastle, who forwarded a letter by post to his correspondent, Mr. Simpson, of London, as follows: "My friend, Mr. C. F. Jackson, lately sold to Maltby & Co. some old lead, through the medium of Mr. J. Crawhall their agent; part of this lead was shipped on board the *Esk*, from here to London, and Maltby & Co. have failed. Mr. Jackson wishes, therefore, a notice to be given immediately to the captain and Mr. Crawhall, if in London, and to the wharfinger, that he as seller of the goods claims to stop them *in transitu* (as we call it in law): will you, therefore, be so good as to do this, and if necessary, to employ a law-man or some other *broker? Whether the notice will eventually be available, is a matter for future consideration."

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Nichol & Son, the defendants, were wharfingers at Dowgate Wharf, and agents for the *Esk*, in London. The last-mentioned letter arrived by the post on the 28th, when Simpson immediately proceeded to look after the lead, and found it in a lighter in the Thames, by the order, and under the control of the defendants the wharfingers: he thereupon went to the defendants at Dowgate Wharf, showed them the plaintiff's letter, and on their behalf demanded the lead of the defendants, and gave them notice not to deliver it to Messrs. Maltby & Co.

The defendants upon that occasion refused to deliver the lead to Mr. Simpson on behalf of the plaintiff, unless he would give them an indemnity.

The question for the opinion of the Court, was—Whether there was not a delivery to Maltby & Co. by the delivery to the order of Crawhall their agent, at Dentshole, or on board the *Esk*: and if not, whether, on the 23rd or 24th of January, 1837, when the demands were made by Fishwick and Bootock on behalf of Maltby & Co., the transit was not at an end: or, whether on the 28th of January, 1837, when the demand of the lead was made by the plaintiff's agent, it was in its transit from the plaintiff's to Maltby & Co. If the Court should be of opinion that there had

been no such delivery to Maltby & Co., or that the transit was not at an end on the 28th of January, then the verdict was to stand for the plaintiff; but if otherwise, a verdict was to be entered for the defendants.

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Wightman, for the plaintiff:

The *transitus* as between the buyer and seller in this case would not be at an end till the lead should have been delivered to the buyer in London; and as no place of delivery was *specified in the contract, the seller might stop the goods in every sort of passage, till they reached the hands of the buyer: *Stokes v. La Riviere* (1), *Hodgson v. Loy* (2), *Bohtlingk v. Inglis* (3). The question is, what is the ultimate destination of the goods, and in cases like the present, whether the parties who detain them are agents to receive the goods, or merely instruments to forward them: *James v. Griffin* (4). Here the agent Crawhall never had possession of the goods at Newcastle, so that there was no delivery to him: he merely handed on the sellers' order for their transmission; and the defendants, wharfingers in London, were carriers to convey the goods to their ultimate destination, the buyer's warehouse in London: they stand in the same situation as the defendant in the case of *Nicholls v. Le Feuvre* (5), where C. purchased goods of the plaintiff in London, and ordered them to be forwarded to Guernsey, by the care of defendant, C.'s shipping agent at Southampton: the defendant took the goods from the warehouse of a London and Southampton waggoner, by whom they had been brought from London, paid the waggoner's charges, and shipped the goods for Guernsey in the defendant's name: C., who was insolvent, wrote at the request of the plaintiff to re-land the goods without saying why: the defendant's clerk, in his master's absence, obtained a Custom-house order for that purpose, but before he had re-landed the goods, the vendor of other goods sold to C., and shipped in the same vessel, although a stranger to and without authority from the plaintiff, ordered the defendant's clerk to stop the goods sold by the plaintiff to C., when the defendant's clerk promised that the defendant should hold them for the owner: it was held that the defendant's having taken those goods from the *waggoner, and having paid the waggoner's charges and shipped the goods, was

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(1) Cited in *Ellis v. Hunt*, 7 R. R. 499 (3 T. R. 466).

(2) 4 R. R. 483 (7 T. R. 440).

(3) 7 R. R. 490 (3 East, 381).

(4) 46 R. R. 242 (1 M. & W. 20).

(5) 2 Bing. N. C. 81.

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not such a determination of the *transitus* to Guernsey as to authorize the defendant to hold the goods in assertion of a lien for a general balance due to him from C.

Bompas, Serjt. for the defendants :

First, the delivery of the lead was complete, and the *transitus* at an end, when the plaintiff signed the order for his servant Johnson to deliver the lead to Crawhall. According to *Coates v. Railton* (1), and *Nicholls v. Le Feuvre*, the question is, what is the ultimate destination of the goods. In *Nicholls v. Le Feuvre* the goods were purchased in London for Guernsey, and therefore it was held that the seller might stop them at Southampton : here, Maltby & Co. purchased the goods for no particular destination, but merely to keep them out of the market ; and with that view proposed that they should remain for some time in the hands of their agent, Crawhall. The delivery order to Crawhall, therefore, was the same thing as a delivery order to themselves, and when that order was acted on by Crawhall, the *transitus* was at an end : *Leeds v. Wright* (2), *Dixon v. Baldwin* (3). The delivery of the goods by the plaintiff to the keelman, in pursuance of Crawhall's order, is a proof that Crawhall was constructively in possession of the goods. In *Rowe v. Pickford* (4), a trader in London was in the habit of purchasing goods at Manchester, and exporting them to the Continent soon after their arrival in London : the goods so consigned to him remained in the waggon office of the defendants, who were carriers, until they were removed by his agent for the purpose of being shipped : a consignment of goods *for the trader was delivered to the defendants on the 9th and 12th of August ; and on the 14th and 17th, the goods arrived at their waggon office ; on the 16th or 17th, the trader became bankrupt ; and, on the 19th, notice to stop the delivery to the bankrupt was given by the consignor to the defendants, who, on the 21st, delivered the goods, by the consignor's order, to a third house : it was held, that the assignees of the bankrupt were intitled to recover the goods deposited with the defendants ; and that the right of the consignor to stop *in transitu*, ceased on the arrival of the goods at the waggon office of the defendants.

Secondly, at all events the *transitus* was at an end when the

(1) 30 R. R. 385 (6 B. & C. 422).

(2) 7 R. R. 779 (3 Bos. & P. 320).

(3) 7 R. R. 681 (5 East, 175).

(4) 19 R. R. 466 (8 Taunt. 83).

goods were delivered on board the *Esk*: for they were so delivered by virtue of an order from the agent of Maltby & Co.: the owners of the *Esk* would not be permitted to dispute the title of the party from whom they received the goods: *Bohtlingk v. Inglis*; *Ellis v. Hunt* (1): and

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Thirdly, the putting the goods into the lighter by the side of the vessel, in London, was tantamount to a delivery to Maltby & Co. The goods were then unshipped; a demand of them and a tender of the freight were made on behalf of Maltby & Co.; and the tortious refusal by the mate of the vessel, could not prejudice the Maltby's right. In *Bohtlingk v. Inglis* (2), LAWRENCE, J. said, "The last question will turn upon this point, whether the goods which are the subject of this action were stopped, (or, what is tantamount to it, demanded by any one authorized by the consignors to receive them from the persons in whose possession they were) while *in transitu*: for it shall never be permitted to a carrier by not delivering the goods to vary the property, and decide to whom they shall belong."

Wightman, in reply:

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A refusal to deliver cannot be held tantamount to delivery; and when the demand was made by the Maltby's clerk, the goods had not reached their ultimate destination.

Then, the order given by the plaintiff to Crawhall was not a delivery of the goods to him, but merely an instrument by which he was enabled to assist in forwarding them to Maltby & Co., whose warehouse was their ultimate destination. The case therefore does not fall within the principle laid down in *Dixon v. Baldwin*, but within that of *Stokes v. La Riviere*, *Bohtlingk v. Inglis*, and *Nicholls v. Le Feuvre*.

Cur. adv. vult.

TINDAL, Ch. J.:

The first question which arises upon this special case is, whether the *transitus* was at an end either by the delivery of the lead from the premises of the plaintiff, to the order of Crawhall, the agent of the buyer, or by the putting of the same on board the *Esk*; and upon this question we are of opinion, that the *transitus* was not determined on either of those occasions.

The general rule is, that the *transitus* is not at an end until

(1) 1 R. R. 743 (3 T. R. 464).

(2) 7 R. R. 490, 497 (3 East, 381, 394).

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the goods arrive at the actual or constructive possession of the consignee. And if the lead had been delivered into the possession of Crawhall as the agent of the buyers, there to remain until Crawhall received orders for their ulterior destination, such possession of Crawhall would have been the constructive possession of the buyers themselves, and the right to stop *in transitu* would have been at an end. The case would then have fallen within the principle laid down in *Dixon v. Baldwin*. But upon the facts stated in this special case, the lead in question never came into the actual possession of Crawhall the agent; for, on the 9th of January, 1887, it was delivered from the premises of the plaintiff, the *seller, to a keelman in the employ of the defendants, for the purpose of being put on board the defendants' vessel, the *Esk*, a general trader between Newcastle and London, and by him was so taken and put on board accordingly. Neither, again, does Crawhall appear to have been an agent of the buyer for the purpose of receiving the lead into his possession, either as a place of deposit, until he received directions from the buyer for its ulterior destination, or for sending it on to the buyer under general directions for that purpose; for whatever may have been his course of dealing on former occasions, in this particular transaction, he acted on and was clothed with no other authority than that which he derived from the letter of the buyer dated the 4th of November, 1886; that is, merely upon a desire expressed in that letter, that the lead should be forwarded without delay. And we think the order given by the plaintiff to deliver the lead to the order of Crawhall, and the subsequent order by Crawhall "to deliver it to the bearer" (who was the keelman) "to go on board the *Esk*," did not amount to any taking possession by Crawhall, but merely formed a link in the chain of the machinery by which the lead was put in motion, and in a course of transmission from the sellers' premises in Newcastle, to the buyers in London; the legal consequence being precisely the same, as if the order to forward the lead had come direct from the buyer to the seller, instead of circuitously through Crawhall's hands; and further, that the putting of the lead on board the *Esk* was only a continuance of such *transitus*.

The second question is, whether the *transitus* was at an end at the time the stoppage took place in the river, that is, on the 28th of January. As to which the facts are, that after the *Esk* had arrived with the lead on board at her moorings in the river Thames,

the lead was put on board a lighter for the purpose of being carried *to the defendants' wharf. On the 28th of January, the demand was made on behalf of the plaintiff, the lead being at that time on board the lighter, and the defendants' servants refused to deliver it.

It is left in some degree of uncertainty upon the statement of the case, whether the defendants' refusal to deliver the lead proceeded from any adverse claim which they had against Messrs. Maltby & Co., the buyers, or whether it was simply a refusal to deliver as holding the lead for Maltby & Co.; but we think in either case the plaintiffs' right of stoppage still existed. For as the right of the vendor to stop *in transitu* is not defeated by any claim of the carrier for his lien for a general balance, or even by a foreign attachment laid upon the goods by a creditor: *Oppenheim v. Russell* (1); it follows that if any claim of lien for a debt due to the defendants existed, of which there is no statement in the case, it could not operate to defeat the plaintiff's right, and if the goods were in the lighter not being subject to any such claim, they were still in a course of *transitus* in order to be delivered, and were not actually delivered to the buyer, notwithstanding the defendants undertook the delivery by the order of Maltby & Co.

It was urged on the part of the defendants, on the authority of the *dictum* of LAWRENCE, J. in *Bohtlingk v. Inglis*, that the tortious act of a third person should not prejudice the rights of the parties: and consequently that the demand made by Fishwick, the clerk of Maltby & Co., on the 24th, and the unlawful refusal to deliver, was tantamount to a delivery. But it is to be recollected, in the first place, that the observation of Mr. Justice LAWRENCE was made in the case of a demand by the consignor for the purpose of revesting his property in the goods, and not in the case of a vendee. And, in *the second place, that here, the goods had not actually reached the terminus of their delivery when the demand of the vendee took place; and although it might be conceded to be the better opinion, that if the vendee actually receives the possession of his goods on their passage to him, and before the voyage has completely terminated, that the delivery is complete, and the right of stoppage gone; yet no authority has been cited for the position, and the principle seems the other way, that a mere demand by the vendee, without any delivery, before the voyage has

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(1) 6 R. R. 604 (3 Bos. & P. 42).

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completely terminated, deprives the consignor of his right of stoppage.

On the whole we think the *transitus* was not at an end when the stoppage took place, and that the verdict must be entered for the plaintiff.

Judgment for plaintiff.

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DEVAUX v. J'ANSON (1).

(5 Bing. N. C. 519—540; S. C. 7 Scott, 507; 2 Arn. 82; 3 Jur. 678; 8 L. J. (N. S.) C. P. 284.)

Plaintiff, owner of a ship, effected a policy on freight at and from the Coromandel coast to Bourbon: the ship put into a port on the Coromandel coast for repairs: plaintiff purchased a cargo, and had it, ready to be sent on board, about seven miles from the port: the ship was lost by an accident in going out of dock: the policy covered perils of the seas and all other perils, losses, and misfortunes:

Held, that plaintiff's interest in the profit of conveying the cargo was properly described as freight; that the cargo being ready when the ship was about to leave the dock, the risk attached; and that the loss was a loss within the terms of the policy.

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THE declaration stated that the plaintiff caused himself to be insured, lost or not lost, at and from Calcutta, or any port or ports, place or places, all or any, and in any succession, on the Coromandel coast, to any port or ports, place or places, in Bourbon, upon any kind of goods and merchandizes, and also upon the *body tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the ship called the *La France*; beginning the adventure upon the said goods and merchandizes from the loading thereof on board the said ship, at as aforesaid; upon the said ship at as aforesaid; and so to continue, upon the said ship until she should be arrived at Bourbon aforesaid, and be moored at anchor twenty-four hours in good safety; and upon the goods and merchandizes until the same should be there discharged and safely landed: it was to be lawful for the said ship in that voyage to proceed and sail to and touch and stay at any port or places whatsoever without prejudice to that insurance: the said ship, goods, and merchandizes, &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy were to be valued at 1,000*l.*: the perils which the assured were contented to bear were of the seas &c., and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage

(1) Commented on by Lord HERSCHELL in *Thames and Mersey Marine Ins. Co. v. Hamilton* (1887) 12 App. Cas. 484, 490, 56 L. J. Q. B. 626, 631.—R. C.

of the said goods and merchandizes and ship, or any part thereof: and by a certain memorandum made on the said writing or policy of insurance, the said insurance was declared to be on 1,000*l.*, on the freight of the said vessel, valued at 1,000*l.*: Promise by the defendant to become an assurer in consideration of premium; and averment of interest in the plaintiff; that the ship was in good safety at a certain port or place on the Coromandel coast, called Coringa; and that whilst the ship was at Coringa aforesaid, and before and at the time of the loss hereinafter mentioned, divers goods and merchandizes amounting to a full cargo of the said ship, which had been bought, procured, and contracted for, for and on account of the said person so interested in the subject-matter of insurance as aforesaid, were there, to wit, at Coringa aforesaid, for the purpose of being shipped and loaded, and which, if it had not *been for the loss hereinafter mentioned, would have been shipped and loaded in and on board the said ship, to be conveyed therein on the said voyage in the said policy of insurance mentioned, to wit, from the Coromandel coast aforesaid to Bourbon aforesaid: that afterwards, and whilst the ship was at Coringa aforesaid, and during the continuance of the said risk in the said policy mentioned, to wit, on &c., the said ship was broken, damaged, and destroyed, and rendered wholly incapable of pursuing the said voyage by certain perils which the said assurers by the said policy did take upon themselves as aforesaid, to wit, by the accidental breaking and giving way of the tackle and supports whereby the said ship was supported, in being moved from a certain dock; in consequence of which breaking and giving way the said ship struck violently against the sand, and was bilged, broken, destroyed, damaged, and rendered incapable of pursuing the said voyage as aforesaid; and the said ship, and the freight, and all benefit, profit, and advantage which the said person interested as aforesaid would otherwise have derived and acquired from the employment of the said ship in the carrying and conveying the said goods and merchandize on the said voyage in the said policy mentioned, and the means of carrying and conveying the said goods and merchandize, were, by the means aforesaid, wholly lost to the said person so interested as aforesaid; whereof the defendant afterwards, to wit, on &c., had notice; by reason whereof the defendant became and was liable to pay, and ought to have paid the sum of 200*l.* so by him insured as aforesaid.

Second count for money had and received &c. Breach, non-payment.

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Pleas : 1st, That the said goods and merchandizes in the declaration in that behalf mentioned, had not, before and at the time of the loss in the first count mentioned, *been bought, procured, and contracted for, for and on account of the said person in the declaration in that behalf mentioned, to be carried and conveyed in the said ship. 2nd, That at the time of the loss in the declaration mentioned, the risk in the said writing or policy of insurance mentioned, had not commenced, and the said writing or policy of insurance had not attached in manner and form, as in and by the declaration was alleged. 3rd, That the said ship was not, at the time of the commencement of the risk insured against by the said policy in the declaration mentioned, seaworthy. 4th, That the ship was not broken, damaged, and destroyed, and rendered incapable of pursuing the said voyage by any perils which the said assurers by the said policy did take upon themselves, in manner and form as in and by the said declaration was alleged. 5th, That the said ship was not at any time after the making of the said policy and before the said loss in the said first count mentioned, in good safety at any port or place on the Coromandel coast in the said policy mentioned, in manner and form as in and by the declaration was alleged. 6th, As to the money alleged to have been received, that the defendant brought 2*l.* 10*s.* into Court, beyond which the plaintiff had not sustained damage. 7th, To the residue of the said declaration, that the defendant did not promise in manner and form &c.

A verdict was found for the plaintiff, damages 200*l.*, subject to the opinion of the Court upon the following case : and it was agreed, that upon matters of fact in the case, the Court should be at liberty to draw the same conclusion as in their judgment ought to be drawn by a jury.

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The ship *La France*, mentioned in the policy, sailed from Havre in the early part of December, 1830, upon a voyage to and in the Indian Ocean, under the direction *of M. Samoise, as supercargo and general agent of the owner. Previous to her sailing, she was carefully surveyed by competent persons, and reported to be perfectly staunch and seaworthy. She soon met with very rough weather, in consequence of which she sprung a leak. About the end of March, 1831, she arrived at Bourbon, where she was surveyed by a commission out of the Admiralty Court of St. Denis, in that island. It appeared that the leak had been caused by a bolt becoming loose between the ribs on the starboard side on the lower

floors : under the authority of the Admiralty Court she underwent a temporary repair, the completion of the repairs being postponed until the arrival of the ship in India, in consequence of there being no convenience at Bourbon for getting at the bottom of the ship, and it being impossible to do the repairs necessary to stop the leak whilst she lay in the roadstead ; the Court therefore declared that it was necessary to take the vessel to India, in order that she might there be hove down, and the leak be repaired on the outside ; and they authorised the captain to proceed to India for that purpose. About the 18th or 20th of April, 1831, she left Bourbon ; and it was sworn by the supercargo, who was on board, that the leak was much diminished by the temporary repair at Bourbon. On passing near Ceylon, she struck violently two or three times upon a bank off Point Pidre on the 24th of May, 1831 : she arrived at Coringa, a small English port and station on the coast of Coromandel in India, on the 6th of June, 1831 ; and having been unballasted, was surveyed under the authority of the local tribunals agreeably to the French law ; the surveyors reported, as the fact was, that the leak, which the captain had been authorised by the Marine Court of St. Denis to come to one of the ports in India to repair, still existed, and that it proceeded *from the lower floors, although the vessel was entirely unballasted ; in consequence whereof they authorised the captain to take his ship up the river, and thence into a dock, as is customary in that country, in order to repair the damages the ship might have sustained, which could not be ascertained until the ship was put into a dry dock. She was accordingly taken up the river ; and it was necessary to lodge her in a dock where her bottom could be worked upon. The usual and proper mode of taking a vessel into dock for repair and out again at Coringa, and which was pursued on the present occasion is as follows : it is necessary to make an excavation in the dock, as in consequence of its being seldom used, the sea is allowed to flow into it, whereby a deposit of soft mud is formed : when the excavation has been made, and the hard bed of sand at the bottom of the dock arrived at, the ship is hauled head foremost into the open space thus afforded : two lines of bamboo stakes are then driven into the mud across the entrance of the dock, the space between the two rows of stakes being filled up with earth thrown out of the dock, which is thus closed from the sea, although a quantity of water still remains at the bottom ; the natives again throw in the soft mud and soil, which has the effect of raising the ship ; and then the water which has remained

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when the dock is closed, is baled out of the dock into the sea ; piles are then driven into the mud on each side of the vessel, and being driven down to the hard bottom of the sand, they form a good support for the vessel. The mud is then cleared sufficiently to admit of the vessel being inspected and repaired. When the vessel has been repaired, she is brought again into the water in the following manner : four thick columns of earth are formed under the vessel ; they are each bound round with a coil of cable made of

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cocoa nut fibre, and then *the piles being removed the vessel rests on these columns so bound : the water is then again let into the dock by re-opening the entrance ; the cables are uncoiled by degrees ; the vessel is gradually let into the water, and she is then floated out.

What was necessary to be done to raise and place the *La France* in the dry dock in a state for repair in the manner before described was all completed about the 3rd or 4th of August, and the vessel was then lying in the dry dock open to inspection of her bottom. Immediately afterwards the repairs were commenced.

About two days after she had entered the river, viz., on the 22nd of June, *Samoise* had commenced the purchase of the ship's return cargo for Bourbon ; and before the completion of the repairs, he had purchased the whole. It consisted of rice, buffalo horns, and hides ; and it was safely deposited in certain warehouses at Jaggernackfoeran, which is distant seven miles from Coringa. The purchases were made on account of the person mentioned in the declaration as interested, who was the owner of the ship.

It was sworn by the supercargo, who was at Coringa at the time, that on the 14th of August, the ship was quite ready for sea, and might have been got afloat in a couple of hours : and it was reported by the surveyors who had made a survey on the 14th of August, that those repairs had been properly executed, and that the ship was in a fit condition to go to sea. But in a petition presented by Cæsar Dejoly, the master of the ship, on the 17th of August, 1831, to the President of the Tribunal of Commerce, he stated that on the 14th of August, the repairs, on account of which the ship had entered the river of Coringa and gone into dock, being on the point of conclusion, the workmen charged with putting the ship in order to get out of dock made their preparations. On the last

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mentioned day, preparations were *actually made for putting the vessel in readiness to go out of the dock, and four cables were placed and raised in a spiral form, the interior of which was full of

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a clayish mould, viz., two forward a little abaft the fore channels, and two astern, on the starboard and larboard sides, and about ten feet afore the mizen mast: the workmen then began to remove the sand which was under the vessel, and which consolidated the shores upon which the ship was resting still. As the work was going on progressively it was perceived that the starboard fore cable more especially was straining the vessel; and immediately the captain communicated it to the harbour master, who assured him it was of no moment. At last, while the work was going on, at two o'clock in the afternoon of the 15th of August, the evil increasing in the captain's judgment, he went on board the ship accompanied by his mate and the ship's carpenter, to see whether any thing had given way. He then found that two ribs at the fastening of the starboard forecable had broken already. He immediately wrote to the captain of the port of Coringa intrusted with the repairs of the vessel, to come to the spot without loss of time, in order to remedy the damage if it were possible. He consulted with the harbour master, and it was decided by them, that as the vessel could not remain in the position in which she was, it was indispensable to lower her entirely, by removing the shores from under the keel. The next day, the 16th of August, this was done; but during that operation, the two stern cables and the larboard forecable were forcing in the ribs and thick stuff, although they had been pillared the evening previous against the barlings of the hold and between decks. The stauncheons of the kelsons having all fallen from the force of the lower masts upon the keel, the garboard streak gave way nearly from end to end; and when at last the ship was no longer upon the shores, she sank into a muddy sand, *when it was found impossible to repair her without raising the ship again by the process used in the country.

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At the time of her sustaining the injury, the depth of water in the dock was about four feet.

A survey was made of the fresh injuries she had sustained; on the 30th of August it appeared that the cost of the repairs amounted to considerably more than the worth of the vessel; that no money upon bottomry or otherwise could be borrowed for the purpose of executing those repairs; and that eight months' time would be required to procure the necessary materials for the repair from other places.

On the 31st of August the President of the Tribunal of the First Instance at Janaon, a French factory, situate about three miles

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from Coringa, directed an abandonment of the vessel ; and that such abandonment was necessary. She was then broken up and sold.

The cargo which had been purchased for the *La France* was shipped on board an English vessel, and by her conveyed to Bourbon ; and above 6,000 rupees was paid to the captain of that ship for the freight thereof.

The questions for the opinion of the Court upon the preceding facts were those raised by the several issues, and the judgment upon each issue was to be entered according to that opinion. If the judgment should be for the plaintiff, the amount was to be the same for which the verdict had been entered.

Wilde, Serjt. for the plaintiff :

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The plaintiff, though owner of the ship as well as of the cargo to be conveyed in it, had an insurable interest in the profit which the conveyance of the cargo would bring him ; and that profit is properly described in the policy under the term freight, which means the price of the carriage of the cargo, whether the owner of the ship or any other *person be the owner of the cargo. If the owner of the ship carries a cargo belonging to another person, he receives his profit in the price paid by that person for the carriage ; if he carries his own cargo, he adds the price of the carriage to the price of the goods, and receives the profit from the purchaser ; but in either case the profit so obtained is properly insurable as freight. This was expressly decided in *Flint v. Flemyng* (1), where it was held that a ship-owner having effected a policy on freight, might, in the event of loss, recover from the underwriter the value of the benefit he, the ship-owner, would have derived (if there had been no loss) by carrying his own goods on the voyage insured.

Secondly, the plaintiff had a vested interest in the subject insured, and the policy attached, though the goods were never on board. The result of the cases is, that the assured is entitled to recover if, having a cargo on board, or a contract for the shipment of goods, he is deprived of the profit of freight by any of the perils insured against : and a purchase of goods by the owner of the ship, is equivalent to a contract with another for the shipment of a cargo : *Flint v. Flemyng* (1), *Montgomery v. Egginton* (2), *Thompson v. Taylor* (3), *Horncastle v. Suart* (4), *Truscott v. Christie* (5), *Warre v.*

(1) 35 R. R. 205 (1 B. & Ad. 45).

(2) 1 R. R. 718 (3 T. R. 362).

(3) 3 R. R. 233 (6 T. R. 478).

(4) 8 R. R. 649 (7 East, 400).

(5) 23 R. R. 446 (2 Brod. & B. 320).

Miller (1). In *Tonge v. Watts* (2), where the assured failed to recover, the facts are imperfectly stated; and it does not appear there was any contract to put a cargo on board: in *Forbes v. Aspinall* (3) and *Forbes v. Cowie* (4), where the policy was held not to attach, the homeward cargo, the freight of which was the subject of insurance, was to be obtained by barter of the outward cargo, and at the time of the *loss the whole of the outward cargo had not been disposed of: it was impossible, therefore, at that time, that the homeward cargo could be put on board. But in *Camden v. Cowley* (5) and *Williamson v. Innes* (6) the beginning to deliver the outward cargo was held to be an inception of the risk.

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Thirdly, as to the seaworthiness; (this objection was abandoned by the counsel for the defendant in the course of the argument.) Then,

Fourthly, this was a loss by one of the perils insured against: the policy is not confined to perils of the sea, but extends to "all other perils, losses, and misfortunes," which have been held to include a sinking occasioned by being fired into under mistake: *Cullen v. Butler* (7); here, however, the ship was docked in the regular prosecution of her voyage, and the accident which befel her on going out of dock has been repeatedly held to be a peril of the sea: as in *Fletcher v. Inglis* (8), where the vessel was ordered into a dry harbour, the bed of which was hard and uneven, and, on the tide having left her, she received damage by taking the ground. So in *Bishop v. Pentland* (9), where the ship was compelled, in the course of her voyage, to put into a tide harbour, and was there moored alongside a quay, the usual place for ships of her burden; it became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over upon the tide leaving her; the rope with which she was so fastened, not being of sufficient strength, broke when the tide left the vessel, and she fell over upon her side, and was thereby stove in and greatly injured; it was held, that that was a stranding within the meaning of that *word in the policy, and that the underwriters were liable for a partial loss, although the stranding might have been occasioned remotely by the negligence of the crew in not providing a rope of sufficient strength to fasten the vessel to the shore. See also

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(1) 28 R. R. 382 (4 B. & C. 538).

(2) 2 Str. 1251.

(3) 12 R. R. 352 (13 East, 323).

(4) 1 Camp. 520.

(5) 1 W. Bl. 417.

(6) 34 R. R. 629, n. (8 Bing. 81; 1 Moo. & Rob. 88).

(7) 17 R. R. 400 (5 M. & S. 461).

(8) 20 R. R. 448 (2 B. & Ald. 315).

(9) 31 R. R. 177 (7 B. & C. 219).

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Phillips v. Barber (1), *Carruthers v. Sydebotham* (2), *Hodgson v. Malcolm* (3), *Busk v. Royal Exchange Assurance Company* (4), *Walker v. Maitland* (5). In *Thompson v. Whitmore* (6), where the vessel having been unskilfully left aground on a hard beach, the underwriters were held not liable.

Sir W. W. Follett, for the defendant :

First, the plaintiff never had an interest in respect of which he could sue an underwriter of this policy on freight ; and

Secondly, there has been no loss by any of the perils insured against.

First, it is not a possible profit, but freight, which is the subject of this insurance, and the plaintiff cannot recover unless he shows that he had an inchoate right to freight which was defeated by the loss of the vessel.

According to the older authorities, no policy on freight attached, unless the goods were on board, in respect of which freight was to be earned : subsequent cases have decided, that if the ship-owner have entered into a contract to receive goods on board, he has an insurable interest in the freight : but in order to claim such an interest, he must be in a condition to sue the parties who fail to perform their contract, and he cannot do that unless his ship be in a condition to receive the cargo. It has been held, too, in *Flint v. Fleming*, that he may insure, as freight, the profit he would derive from carrying his own goods ; but in that case, *the principle on which the policy attaches, is the same as in the other, namely, the ship must be in a condition to receive the goods, and the ship-owner be in a condition to enforce the putting them on board.

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In the present instance, the ship was not in a condition to receive the goods when the loss occurred ; a ship cannot safely be loaded while she is careened, or in a dry dock ; and as the goods were seven miles off, the plaintiff was not in a condition to put them on board. *Tonge v. Watts*, and *Forbes v. Aspinall*, therefore are in point for the defendant. In *Tonge v. Watts* the assured failed to recover, because the ship which was lost in the process of careening, could not receive the goods on board : in *Forbes v. Aspinall*, freight valued at 6,500*l.* was insured on a ship from any port or ports in Hayti to Liverpool ; and the ship which had sailed from Liverpool

(1) 24 R. R. 317 (5 B. & Ald. 161).

(4) 20 R. R. 350 (2 B. & Ald. 73).

(2) 16 R. R. 392 (4 M. & S. 77).

(5) 24 R. R. 320 (5 B. & Ald. 171).

(3) 9 R. R. 656 (2 Bos. & P. (N. R.)

(6) 12 R. R. 642 (3 Taunt. 227).

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to Hayti on a voyage of barter, after exchanging a part of her outward cargo for 55 bales of cotton at one port of Hayti, proceeded with the same to another port, for the purpose of making a similar barter of the rest of the outward cargo, but was lost by a peril of the sea before the barter was effected; it was held that the assured was only intitled to recover for the freight of the 55 bales of the return cargo on board, though there was a moral certainty at the time, that the remaining part of her outward cargo, except for the loss, would have been exchanged for a full return cargo: and Lord ELLENBOROUGH said, "To recover, in any case upon a policy on freight, it is incumbent on the assured to prove, that unless some of the perils insured against had intervened to prevent it, some freight would have been earned; and where the policy is open, the actual amount of the freight, which would have been so earned, limits the extent of the underwriter's liability. In every action upon such a policy, evidence is given, either that goods were put on board,* from the carriage of which freight would result, or that there was some contract under which the ship owner, if the voyage were not stopped by the perils insured against, would have been intitled to demand freight."

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In *Montgomery v. Egginton*, part of the cargo was on board; the ship was in a condition to receive the whole; the policy was a valued policy; and Lord ELLENBOROUGH said of that case in *Forbes v. Aspinall*, "the grounds of the decision do not appear." "If that case, however, is to be considered as having decided, that upon a policy estimating freight upon a full cargo, at 1,500*l.*, a loss by a peril insured against, may be recovered to that extent, when a third only of a cargo is obtained, and freight to the amount of such third could only have been earned, and when it was uncertain whether more ever could have been procured, we should pause long before we allowed ourselves to adopt such a ground of decision; we should hesitate extremely before we should say, that 1,500*l.*, the calculated amount of the whole intended risk, should be paid for a loss of 500*l.* incurred in respect of a third of the intended risk; in other words, that a total loss should be paid for a loss only one third of that which the parties to the insurance contemplated, as the whole subject insured. It is sufficient however to say, that that case is distinguishable from this in many of its circumstances: there, a full cargo was ready to be laden, and the ship in a state ready to receive it." It is because the ship is not in a condition to receive the cargo, that upon an insurance of freight on a homeward voyage, if the ship be lost on her voyage out, the policy does not

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attach. Here, too, the policy was at and from any port on the Coromandel coast ; and in *Palmer v. Marshall* (1), where the policy was on ship at and from Bristol, TINDAL, Ch. J. *said, " there are excepted cases in which the risk would not attach on such a policy, until the time of sailing, as where a ship is not finished or is undergoing a course of repair at the time the policy is effected ; " and BOSANQUET, J. referred to *Williamson v. Innes* (2), where in an action upon a policy on freight, at and from Algoa Bay, Lord LYNDBURST told the jury, " that if the ship was in a condition to begin to take in her homeward cargo, the plaintiff was entitled to recover ; if not, then the verdict ought to be for the defendant." In *Thompson v. Taylor*, where the plaintiff had contracted by charter-party for freight outwards to Teneriffe and the West Indies, and thence home, and the ship was captured in the voyage to Teneriffe, the plaintiff's right to recover was rested on the inception of the contract and the inchoate right to freight which accrued on the ship's sailing from London ; and it was said that, where there is no charter-party, the putting the goods on board gives the inchoate right to freight. In the present case there has been no sailing under a charter-party, nor any goods put on board. In *Horncastle v. Suart*, there was also an inception of the contract by the commencement of a voyage under a charter-party : in *Davidson v. Willasey* (3), half the cargo was on board, and the rest ready. In *Truscott v. Christie*, there was a contract for freight, the goods were on board, and the ship ready to commence her voyage. In *Warre v. Miller*, the question was touching a deviation. But *Sellar v. M'Vicar* (4) shows that if the vessel be lost before the cargo is on board, there can be no claim for freight. Here, if the goods had belonged to a merchant, the plaintiff could not, on the 14th of August, have sued him for not putting them on board, for the ship was not in a condition to receive them ; there could *have been no inception of the contract to convey, and the plaintiff had no inchoate right to freight. But

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Secondly, this was not a loss within the meaning of the policy ; for by " all other losses, perils, and misfortunes," the insurers meant losses *ejusdem generis* as perils of the seas : and the perils of a dry dock arising from the ignorance of Hindoos, are not perils of the seas. The case does not differ in substance from *Thompson v. Whitmore*. In *Fletcher v. Inglis*, the ship was not in a dock but

(1) 34 B. R. 628 (8 Bing. 79).

(4) 8 R. R. 744 (1 Bos. & P. (N. R.)

(2) 34 R. R. 629, n. (8 Bing. 81, n.). 23).

(3) 14 R. R. 438 (1 M. & S. 313).

in a harbour with a hard uneven bottom ; and in *Phillips v. Barber* she was lost by the violence of the wind and weather. In *Hodgson v. Malcolm*, the ship drifted ashore, which was the immediate cause of the loss. There is no instance in which the mere straining of the timbers in a dock has been held a loss by the perils of the seas.

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Wilde, in reply :

It is sufficient to entitle the plaintiff to recover, if there be a contract for freight, or a cargo purchased by the owner with a view to the prosecution of his adventure, and a loss which defeats his expected profit ; it is not necessary, in addition to those incidents, that the ship should be in a condition to receive the goods. That inference has been drawn from particular expressions of the Court in *Horncastle v. Suart*, *Thompson v. Taylor*, and *Forbes v. Aspinall* ; but it is not laid down as a principle in any of those cases, nor does it result from the language of the Judges when taken with reference to the facts of the particular case. There was an inception of the risk here, as soon as the plaintiff had purchased the goods in respect of which he insured the freight : he had then an inchoate right in the profits which the carriage of those goods would have produced. A charter-party between the ship-owner and the merchant is only a medium of proof that the ship-owner has the right in question ; but it proves only *a contract, which the ship-owner may or may not be able to enforce, whereas if the cargo be composed of his own goods, the profit he is to derive from the carriage of them is independent of any risk. However, according to *HEATH, J.* in *Curling v. Long* (1), “ The mere hope or expectation of interest is sufficient to entitle the assured in a policy of insurance, to recover against the under-writers ; ” though, with a view to an action against the consignee, the inception of freight is breaking ground. In *Sellar v. M'Vicar* (2), where a policy on freight was held not to attach, the ship was lost before she arrived at the port at which she was to take the cargo in question on board.

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Cur. adv. vult.

TINDAL, Ch. J. :

This was an action on a policy of insurance, dated 27th August, 1831, lost or not lost, at and from Calcutta, “ or any port or ports, place or places, all or any, and in any succession, on the Coromandel

(1) 4 R. R. 747 (1 Bos. & P. 634). 620 (8 T. R. 154).
See *Le Cras v. Hughes*, Park Ins. 269 ; (2) 8 R. R. 744 (1 Bos. & P. (N. R.)
Craufurd v. Hunter, 4 R. R. 576 (8 23).
T. R. 13) ; *Boehm v. Bell*, 4 R. R.

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coast, to any port or ports, place or places in Bourbon, upon any kind of goods or merchandises, &c., in the good ship or vessel called the *La France*." And the policy was declared to be "on 1,000*l.* on the freight of the said vessel valued at 1,000*l.*" The declaration avers that the ship was in good safety at Coringa, and "that divers goods and merchandises amounting to a full cargo of the said ship or vessel, which had been bought, procured, and contracted for, for and on account of the said persons so interested in the subject-matter of insurance as aforesaid, were at Coringa aforesaid, for the purpose of being shipped and loaded, and which, if it had not been for the loss hereinafter mentioned, would have been shipped and loaded in and on board of the *said ship or vessel, to be carried and conveyed therein on the said voyage in the said policy of assurance mentioned, to wit, from the Coromandel coast to Bourbon aforesaid." And the declaration then proceeds to aver, "that the said ship or vessel was broken, damaged, and destroyed, and rendered wholly incapable of pursuing the said voyage by certain perils which the said assured by the said policy did take upon themselves, to wit, by the accidental breaking and giving way of the tackle and supports whereby the said ship or vessel was supported, in being moved from a certain dock; in consequence of which breaking and giving way, the said ship or vessel struck violently against the sand, and was bilged, broken, destroyed, damaged, and rendered incapable of pursuing the said voyage, and the said ship or vessel, and the freight, and all benefit, profit, and advantage, that the said persons so interested as aforesaid would otherwise have derived and acquired from the employment of the said ship or vessel in the carrying of the said goods and merchandises on the said voyage, and the means of carrying and conveying the same, were by the means aforesaid wholly lost."

The defendant, by his second plea, traversed the allegation "that at the time of the loss in the declaration mentioned, the risk in the said policy mentioned had commenced, and the said writing or policy of assurance had attached;" upon which issue is joined.

By the third plea, he alleged "that the ship was not, at the time of the commencement of the risk insured against by the said policy, seaworthy; upon which also an issue was joined."

By the fourth plea, he traversed the allegation "that the ship was broken, damaged, and destroyed, and rendered incapable of pursuing the voyage by any perils which the said assured by the said policy did take upon themselves." And

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By the fifth plea, he traversed, "that the ship was at any time after the making of the policy, and before the loss, in good safety at any port or place on the Coromandel coast in the said policy mentioned:" on each of which traverses respectively issue was taken.

Such being the state of the pleadings, two main and principal objections against the plaintiff's right to recover any loss on this policy have been raised and argued before us; viz., first, that, under the facts stated in this special case, the policy on freight never attached; and secondly, that supposing the policy to have attached, there was no loss within the policy by any of the perils therein insured against.

The first objection involves two distinct and separate heads of consideration: first, whether the interest of the assured in the subject-matter of insurance, is properly described in the policy as freight: and secondly, if such description is sufficient in the policy, then, whether the interest of the assured in the subject-matter of the insurance had commenced before the loss happened.

But we consider the first question to be set at rest by the decision of the Court of B. R., in the case of *Flint v. F'leming* (1), and hold it to be now established law, that the assured under an insurance upon freight, may recover the profits expected to be made by carrying their own goods in their own ship upon the voyage insured.

The second head of enquiry may be subject to some degree of doubt and difficulty; but, upon the whole, we concur in opinion, that under the circumstances stated in the case, the interest of the assured had commenced, and the policy had attached at the time the loss took place.

The argument which has been mainly relied upon *on the part of the underwriters is this; that, in order to enable the assured to recover a loss upon a policy on freight, there must be a cargo either actually put on board, or ready to be put on board under a contract for that purpose; and in the latter case the ship must also be ready to receive the cargo; and in this case it is contended by the underwriters, that by reason of the loss of the ship before she was out of dock, and actually afloat, she was never in a condition or ready to receive the goods on board: the defendant relying on the expression used by Lord ELLENBOROUGH in giving the judgment of the Court of K. B. in *Forbes v. Aspinall* (2), that in order to recover on a policy on freight, a full cargo must be ready to be shipped, and the ship must be in a condition to receive the cargo. The proposition

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(1) 35 R. R. 205 (1 B. & Ad. 45).

(2) 12 R. R. 352 (13 East, 323).

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that the ship must be ready to receive her cargo, had, in that case, an immediate bearing and application to the facts then before the Court; for the policy was on freight upon the homeward voyage, and the homeward cargo was to be made by barter of the outward cargo, and the whole of the outward cargo had not been bartered at the time of the loss, part of it being still on board, so that it was impossible under those circumstances, that the homeward cargo could be received on board the ship at the time of her loss. In that case, therefore, the loading of the homeward cargo on board, upon which depended the attaching of the policy, and the commencement of the right of the assured to the freight, was not prevented by any of the perils insured against by the policy, as the proximate and immediate cause of such prevention, but by a cause altogether without the risks included in the policy, namely, by the inability of the ship to receive the cargo on board, by reason of her being then partly loaded with the outward *cargo: whereas in the case now before us, it appears that the ship was, on the 14th of August, quite ready to go to sea, and to receive the cargo on board, that nothing remained to prevent her sailing but the getting her out of dock, and that the loss of the ship and consequent inability to receive the cargo was occasioned solely by the endeavour to get her out of the dock, and afloat in the river. If, therefore, the loss of the ship in this case was occasioned by any of the perils within the meaning of the policy, the case is distinguishable from that of *Forbes v. Aspinall*, in this, that the immediate cause of prevention of taking the goods on board was not occasioned by the inability of the ship to receive the cargo, but by the ship being disabled to receive the cargo, by one of the perils insured against. For, so far as relates to the cargo, we think it must be considered as in a sufficient state of readiness to be put on board: it was purchased by the assured for the express purpose of the adventure mentioned in the policy: it was comparatively useless for any other purpose; and the whole of the purchase was completed before the repairs were finished: and although it had been deposited in warehouses at seven miles distance, yet it was deposited there for the purpose of being put on board; and it is impracticable, as it appears to us, to lay down any precise rule as to the distance within which the cargo must be from the ship at the time of the loss, whether close to it, upon the quay, as in the case of *Flint v. Fleming*, or at a more considerable distance, as in the present case. All that it seems necessary to determine with respect to the cargo,

being, that it must have become the property of the parties insured, by a contract made with a view to its being sent on board, and actually in a state of readiness, reference being had to the nature and description of the voyage insured, to be put on board, when the ship arrives at the place of deposit.

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The point remaining to be considered is, whether the loss was occasioned by any of the perils insured against by the policy. It is to be observed the words in the policy are very large; the policy not only enumerates, "perils of the sea," but "all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the subject-matter of the insurance." And the cases cited and relied upon by the plaintiff,—*Carruthers v. Sydebotham*, *Fletcher v. Inglis*, and *Phillips v. Barber*,—are sufficient authority to show that a loss occasioned by the endeavour to get the vessel afloat from the dock in which she had just been repaired was a loss within the policy. Indeed the difficulty which has arisen upon this point in former cases, has rather turned upon the question whether such a loss was properly described in the declaration as a loss by perils of the sea, than to any doubt as to its falling within the general terms of the policy; and in the present case that difficulty is avoided by the mode in which the loss is described in the declaration.

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We do not feel ourselves called upon to enter into the question of sea-worthiness, under the third issue, or of the safety of the ship under the fifth; because the objection of the want of sea-worthiness has been virtually, and we think properly, upon the facts stated in the case, abandoned in the course of the argument: and as to the fifth issue, no point was made before us: but we think upon the two main points which have been argued before us, the plaintiff is entitled to our judgment, and direct the verdict to be entered accordingly.

Judgment for plaintiff.

EMMOTT v. KEARNS.

(5 Bing. N. C. 559—560; S. C. 7 Scott, 687; 8 L. J. (N. S.) C. P. 329; 3 Jur. 436; 7 Dowl. P. C. 630.)

1839.
May 25.
[559]

Plaintiff having pressed W. for payment of a debt, defendant, W.'s attorney, sent to plaintiff a bill accepted by W. at two months, enclosed in a letter, in which defendant said, "W. being disappointed in receiving remittances, and you expressing yourself inconvenienced for money, I send you his acceptance at two months." Plaintiff refused to take the bill unless

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defendant put his name to it. Defendant wrote on the back of the letter, "I will see the bill paid for W.":

Held, that defendant was responsible, and that the consideration for the guaranty sufficiently appeared.

THE declaration stated that John Walsh owed the plaintiff 23*l.* 10*s.* for the hire of a cabriolet; and in consideration that the plaintiff would take by way of payment a bill accepted by Walsh, payable two months after date, and would forbear proceeding for the debt till the bill was due, the defendant promised to guarantee the payment of the bill. Averment of dishonour of the bill, and of non-payment by Walsh and the defendant.

The defendant pleaded, among other things, that there was no sufficient note in writing of his promise, as required by the Statute of Frauds; upon which issue was taken.

At the trial it appeared Walsh owed the plaintiff 23*l.* 10*s.* for the hire of a cabriolet, and that the defendant, who was Walsh's attorney, had written the following letter to the plaintiff, at a time when Walsh was about to go abroad, and the plaintiff had been pressing for his debt.

"RED LION SQUARE, 24th March, '38.

"Major Walsh being again disappointed in receiving remittances, and you expressing yourself inconvenienced for money, I enclose you his acceptance payable here at two months: you may put your name as drawer, and safely pay it away.

"W. M. KEARNS."

The plaintiff called on the defendant to say he would not take the bill unless the defendant also put his name to it, whereupon the defendant wrote, on the back of the above letter,

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"I never put my name to bills: respectable professional men should not; but I will see it paid for Major Walsh.

"W. M. K."

The non-payment of the debt having been proved, an objection was taken that no consideration for the defendant's promise appeared on the guaranty; and the CHIEF JUSTICE was requested to nonsuit the plaintiff; but he declined to do so, and a verdict was given for the whole amount. Whereupon

Andrews, Serjt. now moved for a new trial, contending that the plaintiff ought to have been nonsuited on the ground above stated; and also that the defendant never intended to become personally responsible, but only to see the debt paid out of Major Walsh's estate.

TINDAL, Ch. J. :

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I see no reason for a nonsuit or a new trial. Under the circumstances which have been proved, I think the defendant's indorsement on the letter, which he had himself forwarded with the bill of exchange to the plaintiff, amounts to this, "In consideration of your forbearing to sue Major Walsh for two months, I will pay the bill if he fails to do so."

BOSANQUET, J. :

I think this is a clear case of the plaintiff forbearing to sue at the instance of the defendant.

COLTMAN, J. and ERSKINE, J. concurred.

Rule refused.

DOE D. WYATT v. STAGG.

(5 Bing. N. C. 564—567; S. C. 7 Scott, 690; 9 L. J. (N. S.) C. P. 73; 3 Jur. 1127.)

1839.
May 27.

Executrixes of tenant from year to year signed the following instrument :
"We do hereby renounce and disclaim, and also surrender and yield up to the lessor, all right, title, interest, use, trust, term, and terms of years whatsoever; and possession of that messuage called B."

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Held, a surrender, and not a disclaimer.

EJECTMENT by the overseers of St. Helens for a cottage.

At the trial before Parke, B., it appeared that in 1719 the premises were let to Frank, by the parish officers, for ninety-nine years, at a pepper-corn rent. This lease came into the possession of Stagg, who died and left it to his widow. She married Cheverton, and he held possession of the cottage when the lease expired in 1818. From that time to 1822 he paid the parish officers a rent of 4*l.* 4*s.* per annum.

Cheverton died in 1824; and from that time till 1836 his widow and the daughter of Stagg remained in possession of the premises. Mrs. Cheverton died in 1836, after which the defendant Stagg continued in occupation.

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The lessors of the plaintiff relied on a paper executed in May, 1838, by the executrixes and one of two executors of Cheverton, as follows :

"We, the undersigned executrixes, named and appointed in and by the last will and testament of John Cheverton, late of the parish of St. Helens, in the Isle of Wight and county of Southampton, husbandman, deceased, dated the 15th day of February, 1824, and

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who have duly proved the same in the Registry Court of the Bishop of Winchester, and taken upon ourselves the execution thereof, do hereby renounce and disclaim, and also surrender and yield up, unto the churchwardens and overseers for the time being of the said parish of St. Helens, all right, title, interest, use, trust, term and terms of years whatsoever, and possession of and in all that messuage or tenement and premises called Belcroft, situate in the said parish of St. Helens, formerly in the possession of the said John Cheverton, as tenant thereof to the said parish of St. Helens. Witness our hands, this 21st day of May, 1838.

“HARRIETT WICKENS.

“MATTHEW WICKENS, husband of the above.

“F. M. CHEVERTON.”

This instrument being unstamped, the counsel for the defendant contended that it was a surrender, and objected to its being received in evidence.

The learned Baron thought it might operate as a disclaimer, and, having admitted it in evidence, directed a verdict for the plaintiff, with leave for the defendant to move to set it aside and enter a nonsuit instead.

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The jury found that the tenancy from year to year in *Cheverton had not ended, and that the defendant had not made any surrender.

Erle having obtained a rule *nisi* for a nonsuit on the above objection,

Crowder and *G. Moore*, who showed cause, contended that, as there was no evidence of any tenancy for the last six years, there was nothing to surrender; and, in order that the instrument might have any operation, it must be construed as a disclaimer. In *Leigh v. Thornton* (1), it was held that the Statute of Limitations was a good defence to an action by a landlord for rent, against one who had once been his tenant from year to year, but who had not within the last six years occupied the premises, paid rent, or done any act from which a tenancy could be inferred; although the tenancy had not been determined by a notice to quit.

Without entry, too, the executrixes could not surrender, for till entry an executor has not a possessory title to chattels real: *Williams's Executors*, [557, 9th] edit.; and there was no proof of any entry by the persons who signed this instrument; but they

might renounce *damnosam hereditatem*; Shep. Touchst. 52: and such a renunciation or disclaimer as this would, at all events, render unnecessary any notice to quit: *Doe d. Calvert v. Frowd* (1).

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Erle and *Butt*, in support of the rule:

A disclaimer is a denial of the landlord's title, not a renunciation of the tenant's: *Doe d. Ellerbrock v. Flynn* (2). The instrument in question contains no denial of the landlord's title, and, unless it be construed as a surrender, can have *no operation. Any words will operate as a surrender or assignment, if such be the intention of the party: *Parmenter v. Webber* (3); if an instrument can operate as a surrender it must have the appropriate stamp, though the word surrender be not used: *Williams v. Sawyer* (4); and, even if it would operate as a renunciation of title as well as a surrender, it cannot be used as a renunciation unless it have a surrender stamp; just as a lease, which contains a contract for the sale of goods, cannot be produced as evidence of the contract unless it have a lease stamp: *Corder v. Drakeford* (5).

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TINDAL, Ch. J.:

I am unable to construe this instrument as anything but a surrender. It is not signed by all the executors, and the jury find that Cheverton's tenancy from year to year was still existing. The cause must go down again on payment of costs by the plaintiff.

The rest of the COURT concurred.

Rule absolute for a new trial.

DUTCHMAN v. TOOTH.

(5 Bing. N. C. 577—578; S. C. 7 Scott, 710.)

1839.
May 31.

[577]

"I hereby guarantee you the payment of the proceeds of the goods you have consigned to my brother, and also any future shipments you may make, in consideration of 2s. 6d. paid me:"

Held, a sufficient memorandum, within the Statute of Frauds, to make the subscriber liable to the vendor, notwithstanding it did not expressly disclose by whom the 2s. 6d. was paid.

To assumpsit on a promise by the defendant, (in consideration that the plaintiff at the defendant's request, had paid the defendant

(1) 29 R. R. 624 (4 Bing. 557).

Moore, 656).

(2) 40 R. R. 515 (1 Cr. M. & R. 137).

(4) 3 Brod. & B. 70.

(3) 20 R. R. 575 (8 Taunt. 593; 2

(5) 3 Taunt. 382.

DUTCHMAN *2s. 6d.,*) to guarantee the plaintiff that he should be paid for goods,
 c.
 TOOTH. before the promise, consigned by him to the defendant's brother,
 John Tooth, at Sydney, and also for goods that might thereafter
 be consigned to him,

The defendant pleaded, that the promise in the declaration mentioned was a special promise on the part of the defendant, to answer for the debt and default of Tooth in the declaration mentioned; and that no agreement in respect of or relating to the promise or cause of action, nor any memorandum or note thereof, wherein the consideration for the said special promise was stated or shown, was in writing and signed by the defendant, or by any other person by him thereunto lawfully authorised, according to the form of the statute in such case made and provided: but that the said promise in the declaration mentioned was contained in a certain memorandum in writing, signed by the defendant, and which was as follows:

"I hereby guarantee to you the payment of the proceeds of the goods you have consigned to my brother, John Tooth of Sydney, in your ship the *John Woodall*, Captain Henderson; and also any future shipments you may make to him, in consideration of the sum of *2s. 6d.* paid me, which I hereby acknowledge to have received;" and that, the defendant was ready to verify.

Demurrer and joinder.

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Gurney appeared for the plaintiff, but the Court called on

Barstow, who was for the defendant, to support the plea. He objected to the guaranty that it ought to show a consideration moving from the plaintiff, and it did not appear on this instrument who paid the defendant the *2s. 6d.*

TINDAL, Ch. J. :

The fair intendment of the whole is, that it was paid by the plaintiff to the defendant. Why should any body go out of his way to pay for the plaintiff?

Judgment for plaintiff.

GRAHAM AND OTHERS v. MUSSON (1).

(5 Bing. N. C. 603—608; S. C. 7 Scott, 769; 8 L. J. (N. S.) C. P. 324.)

1839.
June 8.
[603]

A buyer of goods requested D., the agent of the seller, to write a note of the contract in the buyer's book: D. did so, and signed the note with his own name: Held, that the note was not sufficient, under the Statute of Frauds (2), to bind the buyer.

ASSUMPSIT for goods sold and delivered.

The defendant pleaded, first, *non assumpsit*; secondly, the want of a note or memorandum in writing, under the Statute of Frauds, and that there was no acceptance of the goods.

The plaintiffs replied, that there was such note or memorandum.

At the trial before Tindal, Ch. J., a verdict was found for the plaintiffs for 132l. 9s. 9d. subject to the opinion of the Court upon a case, which stated, that

The plaintiffs were wholesale grocers residing in London. On the 19th of August, 1836, the plaintiffs' traveller, Dyson, called on the defendant, who was a grocer at Gainsboro', and on the plaintiffs' account, sold him thirty mats of sugar, to be sent to Fenning's wharf, which is a wharf on the Thames. At the time of the sale, Dyson, in the presence and at the desire of the defendant, made and signed an entry of the contract of sale in a book of the defendant; that book was produced by the defendant at the trial, and the following is a copy of the entry in the hand-writing of Dyson:

"Of North & Co., thirty mats maurs, at 71s.,—cash two months. Fenning's wharf.

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"JOSEPH DYSON.

"August 19, 1836."

The sugars, the price of which amounted to 132l. 3s. 9d., were sent by the plaintiffs to Fenning's wharf; and an invoice was sent to the defendant, stating, that the goods were to go by the vessel called the *Fanny*; but, while waiting for the purpose of being forwarded by the wharfingers to the defendant, they were consumed by fire.

The question for the opinion of the Court, was, whether there was a sufficient note or memorandum in writing within the 17th section of the Statute of Frauds. If the Court should be of that opinion, the verdict was to stand; if not, a nonsuit was to be entered.

(1) Foll. in a similar case, *Graham v. Fretwell* (1841) 3 M. & Gr. 368; (1862) 1 H. & C. 174; 31 L. J. Ex. 337.
disc. in the Ex. Ch., *Durrell v. Evans* (2) See now Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4.—R. C.

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Crompton, for the plaintiffs :

This is a sufficient memorandum of the bargain, within the 17th section of the Statute of Frauds, 19 Car. II. c. 9, which requires a memorandum in writing of the bargain, signed by the party to be charged, or his authorized agent, except where the buyer shall receive part of the goods sold; for Dyson must be taken to have signed it as agent for the defendant, and there is no difference in effect between writing the defendant's name, and writing his own name as agent for the defendant. If he had written the defendant's name, no doubt could have arisen; for though in *Wright v. Dannah* (1), it was held that the agent who signs must be a third person, and not one of the contracting parties; and in *Farebrother v. Simmons* (2), that an auctioneer's signature is not sufficient where he sues as one of the parties to the contract; *those cases were much doubted in *Bird v. Boulter* (3), where it was held, that the entry of the purchaser's name in the auctioneer's book by the clerk of the auctioneer, was sufficient. *Hind v. Whitehouse* (4), *Simon v. Motivos* (5), and *Rucker v. Commeyer* (6), have established, that an auctioneer or broker is the agent of both parties, so as to bind the purchaser by his signature; and in *Hawes v. Foster* (7), it was held sufficient for the purchaser to produce a bought and sold note signed by the agent for the vendor; so that there could be no objection to the defendant's appointing the agent of the plaintiffs to act also as agent for himself. If a broker uses in a contract only his own name, without disclosing that of his principal, it will bind his principal, and it may be shown by parol testimony, for whom the contract is made: *Wilson v. Hart* (8), *White v. Procter* (9), *Kenworthy v. Schofield* (10), *Hicks v. Hankin* (11), *Phillimore v. Barry* (12). In *Champion v. Plummer* (13), the note was signed by the seller only. In *Cooper v. Smith* (14), it was written in the seller's book, not, as here, in the buyer's: and though in *Allen v. Bennet* (15), the note written in the buyer's book without naming the buyer, was connected with him by a subsequent letter; yet, according to the

(1) 11 R. R. 693 (2 Camp. 203).

(2) 24 R. R. 399 (5 B. & Ald. 333).

(3) 38 R. R. 285 (4 B. & Ad. 443).

(4) 8 R. R. 676 (7 East, 558).

(5) 3 Burr. 1921.

(6) 1 Esp. 105.

(7) 42 R. R. 803 (1 Moody & Rob. 368).

(8) 7 Taunt. 295.

(9) 13 R. R. 580 (4 Taunt. 209).

(10) 26 R. R. 600 (2 B. & C. 945).

(11) 4 Esp. 114.

(12) 10 R. R. 742 (1 Camp. 513).

(13) 8 R. R. 795 (1 Bos. & P. (N. R.)

252).

(14) 13 R. R. 397 (15 East, 103).

(15) 12 R. R. 633 (3 Taunt. 169).

principle laid down by MANSFIELD, Ch. J., the note written here in the buyer's book by an agent appointed by him for that purpose, ought of itself to suffice. The name of the seller appears, and it may be shown, by parol testimony, that the name Dyson was written for that of the buyer, and at his request.

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Wightman, for the defendant :

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The principle contended for on the part of the plaintiffs, would introduce all the mischiefs which the Statute of Frauds was intended to prevent. If the name of the agent will suffice, at least it must appear by some writing, that the party signing is an agent : there is no case which decides that the agency may be proved by parol testimony. The name of the party to be charged must be in writing, or that of his authorised agent ; and the agent may prove by parol for whom he contracted ; but the fact of agency must appear in writing, where the defendant himself does not sign the contract : *Bartlett v. Pickersgill* (1).

Here, however, Dyson was not the agent of the defendant to bind him to the contract ; he made the entry in the defendant's book for his convenience at the time, but not as agent to bind him to the contract.

Crompton, in reply :

Bartlett v. Pickersgill turned on the fourth section of the statute ; but, in addition to the cases already cited, *Short v. Spackman* (2) and *Sims v. Bond* (3) show that agency may be established by parol testimony ; though an agent cannot discharge himself by that species of evidence : *Jones v. Littledale* (4).

TINDAL, Ch. J. :

The question to be determined is, whether this note is a note or memorandum of the bargain within the meaning of the seventeenth section of the Statute of Frauds : and I am of opinion it is not. The form of the note is, "Of North & Co., 30 mats maurs, at 71s.—cash 2 months. Fenning's Wharf. JOSEPH DYSON."

The first objection is, that the contract does not disclose *the name of the party to be charged ; so that it falls within the objection raised in *Champion v. Plummer*, where the Court held that a note signed by the seller only, is not a sufficient memorandum within

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(1) 4 East, 577, n.

(3) 39 R. R. 511 (5 B. & Ad. 393).

(2) 2 B. & Ad. 962.

(4) 45 R. R. 542 (6 Ad. & El. 486).

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the statute. The answer made on the part of the plaintiffs is, that the name of Dyson appears at the bottom of the note, and that it must be taken that he was the agent of the buyer : and if such had been the evidence, I am far from saying that such consequence would not follow ; for it is clear that a contract may be signed by an agent, on behalf of his principal, and that his signature would satisfy the Statute of Frauds : but here the name of Musson the buyer is not signed by Dyson, and there is no evidence that Dyson had sufficient authority to act as his agent. Dyson was the traveller of North : the parties present are, Dyson, representing North, and the defendant acting for himself : all that passes is, that Dyson enters a contract in the defendant's book ; there is no evidence that Dyson was to represent the defendant. It is unnecessary, therefore, to decide how far parol evidence is admissible to establish the fact of agency, because here there is no evidence of agency at all. In *Bird v. Boulter* the names of both the contracting parties appeared, and it was impossible to say that the clerk of the auctioneer putting down the name of the buyer with his assent, was not agent for that purpose. Our judgment must be for the defendant.

VAUGHAN, J. :

The plaintiffs' case fails in their not showing that Dyson was the defendant's agent ; it is unnecessary, therefore, to enter into the authorities which have been cited. Dyson was agent for the plaintiffs, and the defendant in requesting him to make the entry in his book, probably sought to fix the plaintiffs, but not to appoint Dyson as agent for himself.

[608] COLTMAN, J. :

I am of the same opinion. It is not desirable to relax the provisions of the Statute of Frauds. I am not prepared to say that if Dyson had been the clerk of Musson, his signing his own name would have been a sufficient memorandum of the bargain to satisfy the statute : but Dyson is not the agent of Musson in any respect ; and though if he had signed the name of Musson at Musson's request, the case might have fallen within the authority of *Bird v. Boulter*, yet here where he signs his own name, he thereby only binds his employer North.

ERSKINE, J. :

I am of the same opinion. It is contended on behalf of the

plaintiffs, that Dyson would be himself liable on this contract, and would not be permitted to discharge himself by parol testimony; but that he might charge his principal by showing that he signed as agent, and that the cases show it is enough if the agent's name appear on the contract. That brings us to the question whether Dyson was the agent of Musson: but there is no evidence of his having ever been appointed such agent, and therefore we give

Judgment for the defendant.

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HIGHAM v. RABETT.

(5 Bing. N. C. 622—625; S. C. 7 Scott, 827; 7 Dowl. P. C. 653.)

To an action of trespass, defendant pleaded a right of way on foot and with horses, cattle, carts, waggons, and other carriages for the convenient occupation of his close K.

The jury having found that he had a right of carting timber and wood only from K.: Held, that plaintiff was entitled to the entire verdict, and that defendant could not enter it distributively for such right as the jury found.

1839.
June 10.
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TRESPASS for breaking and entering the plaintiff's close, and prostrating his gates and gate-posts.

Pleas, 1. Not guilty.

2. A right of way on foot, and with horses, cattle, carts, waggons, and other carriages, for the defendant and his servants, at all times of the year, at their free will and pleasure, for the more convenient occupation of a close of the defendant's, called King's Haugh Wood.

3. A similar right of way in respect of a close called Further Barker's.

4. *Liberum tenementum.*

Issues having been raised on these pleas, at the trial before Littledale, J., the jury found a verdict for the plaintiff on the first, third, and fourth; and on the second, that the defendant had a right of carting timber and wood only from King's Haugh Wood, along the plaintiff's close. It did not appear whether or not he had been carting wood upon the occasion in question. Upon this finding, the learned Judge directed a verdict to be entered for the defendant on the second plea, with leave for the plaintiff to move to enter on it, instead, a verdict for the plaintiff.

Kelly moved for a rule *nisi* accordingly, on the ground that the defendant having failed in establishing *the right of way to the extent to which he claimed it, or even in showing that he was

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carting wood on the occasion in question, the plaintiff was entitled to the verdict on the second plea. There was no question as to the others. A rule *nisi* having been granted,

Stephen, Serjt., B. Andrews, and Palmer, showed cause :

The jury have found that the defendant had a limited right of way: and if he had a right of way to any extent or for any purpose, he was justified in entering the plaintiff's close, and removing any obstruction. The obstruction was equally an impediment to a limited as to an unlimited right of way; and the real issue raised by the plea is, whether or not the defendant was justified in removing that obstruction: in relation to that question, the precise extent of his right was immaterial, or the precise mode in which he was exercising it. If that had been material, the plaintiff should have new-assigned. Where a defendant has not made out his plea to the extent he has pleaded it, yet, if he proves enough to show that the plaintiff has no right of action, he entitles himself to the verdict: *Benington v. Benington* (1). In *Tapley v. Wainwright* (2), the defendant pleaded to trespass *qu. cl. fr.*, that two closes in which the trespass had been committed, had been severed by the plaintiff from a waste over which the defendant had a right of common; the plaintiff replied, that they had been enclosed for more than twenty years; and it was held that that replication was sufficiently established, by showing that any part of them had been enclosed for that period.

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(TINDAL, Ch. J.: If the verdict be entered for the defendant, this plea would be evidence in all future times that the defendant had a right to the extent stated in the plea; but according to *Morewood v. Wood* (3), if you *do not prove a prescription as laid, you fail altogether. We think the defendant cannot be entitled to a verdict generally on this plea.)

At all events, he may take it distributively, and treat the several allegations as several pleas, within the principle of rules 4, 5, 6 of Hil. 4 Will. IV.; as in *Knight v. Woore* (4), and *Phythian v. White* (5).

Kelly and Gunning, in support of the rule:

Ballard v. Dyson (6) and *Drewell v. Towler* (7), show conclusively

(1) Cro. Eliz. 157.

(2) 5 B. & Ad. 395.

(3) 2 R. R. 349 (4 T. R. 157).

(4) 3 Bing. N. C. 3.

(5) 1 M. & W. 216.

(6) 9 R. R. 770 (1 Taunt. 279).

(7) 3 B. & Ad. 735.

that a defendant or plaintiff who set up a prescriptive right, and prove one less extensive than they have alleged, fail altogether; and where a defendant pleads a right more extensive than he is entitled to, the plaintiff need not new-assign the limited or qualified right: *Cowling v. Higginson* (1). The only question is, whether the defendant can enter a verdict distributively on this plea, under the rules of Hil. 4 Will. IV. And a verdict can only be entered distributively where the jury finds one of several allegations contained in the pleading; but here there is no allegation that the defendant has a right of way for the purpose of carting timber; and the finding of the jury is of something which does not appear on the record at all. In order to enter a distributive verdict, the Court must amend; and they will not amend by inserting a species of right which the defendant never claimed, and which therefore the plaintiff could not be prepared to meet.

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TINDAL, Ch. J.:

It appears to me that this is a general plea of right of way on foot and with horses, cattle, carts, waggons, and other carriages, at the defendant's free will and pleasure, for the more convenient occupation of his close, called King's Haugh Wood; and as *the jury have found a right for carting timber and wood only, from King's Haugh Wood, the question is, whether the plea can be taken distributively, and the verdict be entered accordingly: and I think it cannot. I cannot put it as a plea asserting a general right of way for all purposes, and another right for a particular purpose. But we are called upon, when the defendant says there is a general right for the convenient occupation of his close, to qualify it by saying that the verdict shall be entered as for a right of carting timber only. The new rules do not apply to such a case. If the defendant wishes to qualify it by amendment, it can only be allowed on payment of costs. He may have leave to amend the plea according to the verdict; the plaintiff to be at liberty to reply *de novo*, and the other pleas to be withdrawn.

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VAUGHAN, J.:

In *Knight v. Woore*, the defendant pleaded a right of way for the purpose of conveying water and goods from the river; and the jury found he had a right to fetch water. What the jury found therefore

(1) 4 M. & W. 245.

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was contained in the plea, and the allegations were capable of being distributed; here the jury have found, but the defendant has nowhere alleged, a right of way for carting timber only.

COLTMAN, J. and ERSKINE, J. concurring, the defendant had

Leave to amend on payment of costs.

1839.
June 11.
[626]

TOTTON, DEMANDANT; VINCENT, DEFORCIANT.

(5 Bing. N. C. 626; S. C. 7 Scott, 835.)

Fine of conusor's lands in Y. and any other adjoining parish, amended by inserting the parish of R., an adjoining parish in which the conusor had land, which had gone according to the deed to lead the uses.

BOMPAS, Serjt. moved to amend a fine of Hil. 49 Geo. III., by inserting the parish of Ridgewell.

The deed to lead the uses conveyed a close, called Boveley, in the parish of Great Yeldham, and all the conusor's other lands in the parish of Great Yeldham, or any other adjoining parish.

By affidavit, it now appeared that a small portion of the land was in the adjoining parish of Ridgewell, and that the possession had gone consistently with the deed.

By 3 & 4 Will. IV. c. 74, ss. 7, 9, if it be apparent on the deed that there is an omission of any portion of land intended to be passed, the fine shall be valid as to that portion, without amendment; but as the omission here appeared only by affidavit, the parties applied to amend.

Per CURIAM:

Fiat.

1839.
May 21.
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TOPLIS AND ANOTHER v. GRANE (1).

(5 Bing. N. C. 636—652; S. C. 7 Scott, 620; 2 Arn. 110; 9 L. J. (N. S.) C. P. 180.)

Defendant, attorney of O., authorized plaintiffs, as brokers, to distrain the goods on A.'s premises, for rent due to O.; whereupon the distress was made. Some of the goods being privileged from distress, and claimed by the owners, plaintiffs required an indemnity, which defendant gave on the part of O., and afterwards said he would give a further guaranty. The owners of the privileged goods having sued and recovered against plaintiffs: Held, that defendant was liable to make good the loss they had sustained.

THE declaration stated, that the defendant at the time of the making of his promise and undertaking thereafter mentioned,

(1) Followed in *Dugdale v. Lovering* (1875) L. R. 10 C. P. 196, 44 L. J. C. P. 197.—R. C.

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carried on the business of an attorney and solicitor; that just before the time when, &c., he had represented and affirmed to the plaintiffs that he was the attorney of one Frances Osborne, and that the said F. Osborne was then lawfully entitled to certain arrears of rent, to wit, 210*l.* 15*s.* 6*d.*, due to her at Christmas, 1831, from one William Armstrong, in respect of the rent of certain premises, being No. 5, New Bridge Street, in the parish of St. Bride's, in the city of London; and that she was then entitled to distrain on the said premises for the recovery thereof; and thereupon, on the 14th of January, 1832, in consideration thereof, and that the plaintiffs, at the *special instance and request of the defendant, would, by themselves or their agents, seize and distrain certain goods and chattels on the premises at No. 5, New Bridge Street, for the recovery of the said arrears of rent so alleged to be due to F. Osborne, the defendant undertook, and then faithfully promised the plaintiffs to indemnify and save harmless the plaintiffs from all loss, damage, costs, and charges which should or might arise or happen, or be incurred by them for or by reason of such seizure and distress of the said goods and chattels, or any of them: that the plaintiffs, confiding in the said promise and undertaking of the defendant, did then employ certain persons then carrying on the business of brokers in copartnership, to wit, one Thomas Warlters, one William Warlters, and one Samuel Lovejoy, to make such seizure and distress of the said several goods and chattels as agents of the plaintiffs in that behalf; and the defendant then assented to the employment of such last mentioned persons by the plaintiffs. That the said agents of the plaintiffs did then, to wit, on, &c. as such agents, seize and distrain the said several goods and chattels then being on the premises for the recovery of the arrears of rent alleged by the defendant to be due to F. Osborne. That after the said seizure and distress, to wit, on, &c., divers large quantities of the said goods and chattels so distrained as aforesaid were claimed by divers persons, on the ground that the same goods and chattels respectively were privileged from the said seizure and distress so made on behalf of F. Osborne; of which claims the defendant had notice, and was then requested by the plaintiffs to permit them to return the same goods and chattels to the said respective claimants, but the defendant then wholly refused to give such permission, and then directed the plaintiffs to retain the said goods and chattels, and cause the same *to be retained as such distress as aforesaid. That several persons

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who had so claimed the said several goods and chattels on the ground of their being so privileged from distress and seizure, and who were then at the time of the said distress in fact entitled to the possession of the same goods and chattels respectively, thereupon impleaded said T. Warlters and W. Warlters, together with other persons, in divers, to wit, ten different actions at law, for the recovery of damages in respect of the seizure and detention of the several goods and chattels to which they were so respectively entitled; which said respective actions the defendant did defend or cause to be defended; and such proceedings were thereupon had in the said several actions that they the said T. Warlters and W. Warlters were afterwards forced and obliged to pay, and did out of the joint funds of themselves and said S. Lovejoy as such copartners, pay unto the said several persons, being plaintiffs in the respective actions, divers sums of money, amounting in the whole to 140*l.*, for damages in respect of such seizure and distress of and upon their said respective goods and chattels, and in order to compromise the claims and demands of the said several persons in respect thereof, and for certain costs of suit of the respective plaintiffs in the said actions; and T. Warlters and W. Warlters were also forced and obliged to pay, and did out of the joint funds of themselves and S. Lovejoy, as such copartners, pay divers other sums of money, amounting in the whole to 150*l.*, for costs necessarily incurred by them in respect of the premises, and in and about the keeping and detaining of the said goods and chattels to await the result of the actions; and the said T. Warlters, W. Warlters, and S. Lovejoy, then demanded payment from the plaintiffs of the several last mentioned sums of money: But although the said respective goods and chattels so claimed as

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being privileged *from the distress and seizure were at the time of such distress and seizure in fact so privileged, whereof the defendant had due notice; and although afterwards, on the 25th January, 1835, the plaintiffs gave notice to the defendant of the demand of payment so made upon them by T. Warlters, W. Warlters, and S. Lovejoy, and then requested the defendant to indemnify and save harmless the plaintiffs from and against the same payments and all damages in respect of the premises; nevertheless, the defendant, not regarding his promise and undertaking, did not, nor would, when he was so requested, or at any other time, indemnify and save harmless the plaintiffs from such payments to T. Warlters, W. Warlters, and S. Lovejoy, of the last

mentioned sums of money or any part thereof, or of all damages in respect thereof, but wholly neglected and refused so to do: by means whereof they, for recovering damages on occasion of the premises, afterwards impleaded the plaintiffs in a certain action in his Majesty's Court of Exchequer, and such proceedings were thereupon had in the said Court, that the said T. Warlters, W. Warlters, and S. Lovejoy, afterwards, by the consideration and judgment of the Court, recovered against the plaintiffs a large sum of money on occasion of the premises, and of their costs by them about their suit in that behalf expended, to wit, 164*l.* 9*s.*, which sum of money the plaintiffs afterwards, to wit, on, &c., were forced and obliged to pay, and did then pay to T. Warlters, W. Warlters, and S. Lovejoy: and the plaintiffs were also forced and obliged to lay out and expend, and did lay out and expend, a large sum, to wit, 50*l.*, in and about their defence in the said action: from which said several sums of money so paid by the plaintiffs, the defendant had not indemnified and saved harmless the plaintiffs, although often requested so to do, but had therein wholly failed and made default, contrary *to the form and effect of the said promise and undertaking of the defendant so by him made. The plaintiffs also alleged as a further breach, that although they had been put to and had incurred divers other costs and charges, to wit, 100*l.*, on occasion of the premises; and although afterwards, on the 4th of June, 1835, the plaintiffs required the defendant to indemnify them the said costs, charges, and expenses, yet the defendant, not regarding his said promise, had not indemnified the plaintiffs, nor paid to them the said moneys, or any part of them.

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The declaration also contained *indebitatus* counts,—each claiming 200*l.*, for the price and value of work done and materials for the same provided by the plaintiffs; for money paid for the use of the defendant; and for money found to be due on an account stated.

The defendant pleaded, first, *non assumpsit*, upon which issue was joined. Secondly, as to so much of the causes of action in the first count mentioned as related to the employment of T. Warlters, W. Warlters, and S. Lovejoy, by the plaintiffs in that count mentioned, that the defendant did not assent to the employment of them to make such seizure and distress *modo et formâ*; upon which issue was joined. Eighthly, as to the first count, that the plaintiffs were damnified as in that count mentioned, by and through the negligence, misconduct, and default of the plaintiffs and their servants, and by and through the want of skill, care,

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and attention of the plaintiffs and of their servants, and not further or otherwise. Eleventhly, as to the second and third counts, that the said work in the second count mentioned, was done and performed by the plaintiffs, upon the retainer of the defendant, for the purpose of distraining for certain arrears of rent in and upon certain premises; and that the materials therein also mentioned were provided by the plaintiffs *in and about the same; and that the money in the third count mentioned was paid and disbursed by the plaintiffs in and about the said work upon the said retainer, and for the purpose aforesaid; and that the work was done and performed by the plaintiffs in so negligent, unskilful, and improper a manner, that by and through the default, negligence, and want of skill, care, and attention of the plaintiffs in that behalf, the said work and the materials for the same provided, and the disbursements so made, became and were wholly useless and of no value whatsoever to the defendant; whereof the plaintiffs, at the time in the second and third counts mentioned, had notice.

To the eighth plea, the plaintiffs replied, that they were not damnified as in the first count mentioned, by and through the negligence, misconduct, or default of the plaintiffs or their servants, or by or through the want of skill, care, or attention of the plaintiffs or their servants, *modo et formâ*: upon which issue was joined. To the eleventh, that the work in the second count mentioned was not done and performed by the plaintiffs in so negligent, unskilful, or improper a manner, that by and through the default, negligence, want of skill, care, or attention of the plaintiffs in that behalf, the work and materials for the same provided, and the disbursements so made in respect of the same, became and were wholly useless, and of no value whatever to the defendant, *modo et formâ*; upon which issue was joined.

The action was brought to recover the sum of 185*l.* 9*s.* 6*d.* under the following circumstances.

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The plaintiffs, at the several times hereinafter mentioned, were partners as auctioneers and valuers, under the firm of Toplis and Son. The defendant is an attorney; and from a period anterior to Christmas, 1831, *until the 24th of June, 1832, carried on business as such in partnership with Brooks and Cooper; since that time he has practised as an attorney without a partner.

At Christmas, 1831, the sum of 210*l.* 15*s.* 6*d.* became due from William Armstrong to Frances Osborne, the aunt of the defendant, in the first count respectively named, for rent of the premises in

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the first count referred to. William Armstrong was an auctioneer ; and the lower part of the premises was used by him for the purpose of an auction room. On the afternoon of Saturday, the 14th of January, 1832, the defendant called at the plaintiffs' office, but not finding them there, he gave their clerk the following written authority to distrain: "To Messrs. Toplis, or their agent,—I do hereby authorise you, or your agent, to seize and distrain the several goods and chattels on the premises, No. 5, New Bridge Street, in the parish of St. Bride's, in the city of London, for the sum of 210*l.* 15*s.* 6*d.* for arrears of rent due from William Armstrong to Frances Osborne, at Christmas last: and for so doing this shall be a sufficient warrant or authority. As witness," &c.

The defendant desired the clerk to get the distress levied forthwith, as there was a large quantity of furniture in the auction room. On being informed that both the plaintiffs were absent, he said, unless he could get the distress levied at once, he must take it elsewhere to be done; whereupon the clerk observed, that as soon as any one came in it should be attended to. The clerk altered the warrant by erasing the name Toplis, and substituting the name of Warlters, and by introducing after the words "or their agent," the name of "Joshua Gray." He then took the warrant, as altered, to Messrs. Warlters and Lovejoy, with directions to execute the same forthwith: and early on Monday morning the 16th of January, Messrs. Warlters and Lovejoy, by their clerk, Joshua Gray, distrained all the goods on the *premises for the arrears of rent. Their man, Jonathan Armstrong, was left in possession of the said distress on the premises.

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Afterwards, the plaintiffs informed the defendant of the levying of the distress, by the following letter:

"SIR,—We beg respectfully to inform you, that the levy and distress was made on the effects at Armstrong's which produced a strong sensation on the parties interested, and they have made many threats on the subject, but we presume there will be no difficulty."

On the 19th of January, Messrs. Warlters & Co. were served with written notices directed to them and to the defendant, and to the said Frances Osborne, of claims of some of the goods by ten different persons, as being their property; whereupon Messrs. Warlters handed over such respective notices to the defendant. On the same day the plaintiffs sent their clerk to the defendant, to

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request that he would give them further directions, and an express indemnity before they proceeded further with the distress: when the defendant wrote to the plaintiffs the following letter:

"SIR,—We hereby undertake on the part of Mrs. Osborne, to indemnify you for proceeding to sell the goods distrained on the premises, No. 5, New Bridge Street.

"Your obedient servants,

"20 January, 1892.

"BROOKS, GRANE, AND COOPER.

"To Messrs. TOPLIS AND SON."

Whereupon the plaintiffs forwarded the same to Messrs. Warlters, with the addition underwritten of the following indemnity, which they required:

"We hereby undertake to indemnify you in the above matter.

"JAMES TOPLIS AND SON.

"To Messrs. WARLTERS AND LOVEJOY."

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On the 21st of January the goods distrained were duly condemned, and some of them were removed from Armstrong's premises to Messrs. Warlters & Co.'s ware-rooms in Farringdon Street, preparatory to a sale; of which removal the defendant had notice.

On the 23rd of January a clerk of Messrs. Warlters called on the defendant, and stated that Mr. Marks, the claimant's attorney, had called upon Messrs. Warlters, and said that he had got a note from the defendant to deliver up the goods; when the defendant said that Messrs. Warlters were to go on with his, defendant's, instructions till the same were contradicted.

On the 24th of January the defendant called upon the plaintiffs, and told them they were to go on with the distress, and that he would give them a further guaranty.

On the 25th of January the defendant called upon Messrs. Warlters, and stated he would write to them that evening or the following morning; and that the goods were not to be removed till then. Messrs. Warlters then advertised the goods for sale, on Friday, the 27th of January.

On the 28th of January the defendant wrote to the plaintiffs, "As the goods are not yet sold, I must request you to consider my letter to you of the 20th instant, containing an undertaking on the part of Mrs. Osborne to indemnify you for selling them, as revoked. I must leave you to exercise your own discretion as to selling them or not; but if you wish for any other indemnity or guaranty, I will with pleasure apply to Mrs. Osborne for her sanction."

The case then set out a voluminous correspondence, from which it appeared that the ten claimants proceeded with their actions against Warlters & Co.: the defendant refused to give any indemnity, or any positive instructions as to defending the actions or selling the *goods: and ultimately, judgment having been given for the claimant in one action, the others were all compromised, Warlters & Co. restoring the goods and paying the claimants' taxed costs.

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Warlters & Co. then sued the plaintiffs for the amount they had paid in those actions, and for their own charges for distraining, and recovered against the plaintiffs 16*l.* 9*s.*: the plaintiffs' costs of defending that action were 21*l.* 0*s.* 6*d.*: making in the whole 185*l.* 9*s.* 6*d.*

The Court was to be at liberty to draw any inferences of fact which the jury, under the circumstances, might have drawn; and the parties agreed to be concluded by the finding of the Court upon the whole matter: and the question for the opinion of the Court was, whether, under the circumstances, the defendant was liable or not, and, if he was, to what amount; and the verdict and judgment was to be entered accordingly.

The case was argued during the sittings in Banc after Hilary Term, by

Wightman, for the plaintiffs, who contended that the defendant, by his letter of the 14th of January, and the specific orders given on the 23rd, 24th, and 25th, had made himself responsible to the plaintiffs; and, as his warrant of distress was addressed to the plaintiffs or their agent, the striking out the name Toplis, and inserting that of Warlters, was immaterial: at all events, it was sanctioned by the order given to Warlters & Co. on the 23rd of January to go on with the distress.

W. H. Watson, for the defendant, argued that the indemnity given by the defendant extended only to legal acts of the bailiff; for a wrong-doer cannot claim an indemnity: that it was binding on Mrs. Osborne and not on the defendant; or, if binding on the defendant, that it was an indemnity by Brooks, Grane, & *Co., and not by the defendant alone: *Burrell v. Jones* (1): also that, if it turned out to be an executed contract when the declaration alleged it to be executory, the variance was fatal: Com. Dig. Action on the Case on Assumpsit, F. 6.

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The warrant of the 14th of January contained no specific

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authority, and, therefore, if the goods were not distrainable, there was no indemnity, and the bailiff, not the defendant, must be liable. In *Adamson v. Jarvis* (1) there was a specific authority given by the defendant to the auctioneer to sell the goods in question: so in *Humphreys v. Pratt* (2) the defendant, who had desired certain cows to be taken in execution, was held responsible to the sheriff because he had given a specific authority, and for his own benefit. The defendant here, had given no express indemnity; and though, where the facts warrant it, an indemnity may be implied from facts: *Betts v. Gibbins* (3), yet in *Farebrother v. Ansley* (4) it was held that there is no implied promise on the part of a sheriff to indemnify an auctioneer who sells goods under a *fi. fa.*, when employed to do so by the sheriff's officer to whom the warrant is directed, and the plaintiff's attorney in the original cause; although the sheriff certifies to the excise office that he himself has seized and sold the goods. *Wilson v. Milner* (5) confirms the same principle. Here, it was impossible to imply from the facts an intention to give an indemnity, for the defendant was not a principal, but merely attorney or agent for Mrs. Osborne. And an attorney is not liable as principal, unless he explicitly undertakes such a liability: *Robins v. Bridge* (6), *Hartop v. Juckes* (7).

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At all events, the defendant was not responsible for the employment of Warlters & Co. There was no authority for erasing the name of Toplis and inserting another; nor, after the erasure, any evidence that the name of Toplis had ever been there. In *Housin v. Barrow* (8), the sheriff directed a warrant to one Moore, and all his other officers, to arrest the defendant, and Moore having afterwards inserted the name of Cook, it was held, that the warrant was illegal, and that the arrest by Cook was consequently void: and the same principle was acted on in *Burslem v. Fern* (9).

The rest of the argument turned on various questions of fact raised by the special case.

Wightman, in reply:

Where the authority is illegal, both parties knowing it to be illegal, no indemnity can arise: *Shackell v. Rosier* (10); but where

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| (1) 29 R. R. 503 (4 Bing. 66). | (6) 49 R. R. 531 (3 M. & W. 114). |
| (2) 35 R. R. 41 (5 Bligh, N. S. 154; | (7) 1 M. & S. 709; 2 M. & S. 438. |
| 2 Dow & Cl. 288). | (8) 3 R. R. 135 (6 T. R. 122). |
| (3) 41 R. R. 381 (2 Ad. & El. 57). | (9) 2 Wils. 47. |
| (4) 1 Camp. 343. | (10) 42 R. R. 666 (2 Bing. N. C. 634). |
| (5) 2 Camp. 452. | |

a defendant directs a party to take certain goods which he thinks himself authorised to take, he is bound to indemnify his own agent : *Adamson v. Jarvis ; Betts v. Gibbins.*

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Cur. adv. vult.

TINDAL, Ch. J. :

The declaration in this case consisted of a special count upon a promise of indemnity, alleged to be made by the defendant to the plaintiffs, and of the common *indebitatus* counts, for work and labour, for money paid, and for money due upon an account stated. To the whole of which declaration the defendant pleaded *non assumpsit*, and to different parts of the declaration ten other pleas. As it will be necessary to consider separately the issue raised upon each of these pleas, it will be most convenient to take them in their order, and to apply the facts found in the special case separately to each plea.

The special count states, that “ in consideration that the plaintiffs at the request of the defendant would by themselves or their agents seize and distrain certain goods and chattels on certain premises, for the recovery of certain arrears of rent alleged to be due to Frances Osborne, he, the defendant, undertook to indemnify and save harmless the plaintiffs from all loss, damage, costs, and charges, which should or might arise, or happen to, or be incurred by them, for or by reason of such seizure and distress of the said goods and chattels, or any of them.”

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The plea of *non assumpsit*, so far as it relates to this special count, puts in issue the promise to indemnify therein alleged ; and consequently the first, and indeed the principal question raised upon the record, is, whether the promise to indemnify, as laid in the declaration, is supported or not by the evidence. And we are of opinion, that upon such evidence given at the trial of this action, a jury would have inferred, and would have been justified in inferring, the promise to indemnify as laid in the declaration.

It is quite unnecessary to lay it down as a general rule of law, that the broker who enters under an ordinary warrant of distress, and takes goods upon the premises that are privileged by law from distress, can look for indemnity from his employer. In most cases, the broker has a better opportunity of informing himself, as to any exemption from the liability to distress which may belong to the goods found upon the premises, than the landlord or his agent can possibly have. The landlord and the agent, indeed, have frequently

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no opportunity whatever. To hold, therefore, as a general proposition, that the law gives, in all cases, an indemnity to the broker, would have the effect, in many, of throwing the consequences of his own wrongful act or want of caution from himself upon his employer; *and would tend to render him generally careless in the discharge of his duty. But we think the facts stated in this special case would satisfy a jury, that the defendant, by his conduct throughout the whole transaction, caused the plaintiffs to believe that they were acting under an indemnity from him, and that such indemnity, therefore, may be justly inferred to have been given. In the first place, the defendant knew that the premises on which the distress was to be taken were in the occupation of an auctioneer, and that the lower part of the premises were used by him for the purpose of an auction room. In the next place, by his warrant of distress, he directs the plaintiffs or their agent to seize and distrain "the several goods and chattels on the premises," words that necessarily import his intention that no part of the goods were to be left. In the third place, the defendant desires the distress to be levied forthwith, assigning as a reason to the plaintiffs' clerk, "that there was a large quantity of furniture in the auction room," which could not have been understood by the plaintiffs in any other sense than a specific direction to take the furniture there found; the defendant adding, by way of urgency to his direction, "that, unless the plaintiffs could get the distress levied at once, he must take it elsewhere to be done." And, lastly, the request made by the plaintiffs to the defendant for an express indemnity, before they proceeded further with the distress, shows that they had contemplated acting under an indemnity; and the express indemnity then given, to which the defendant was one of the subscribing parties, viz., an indemnity for proceeding to sell the goods, was calculated still further to assure the plaintiffs that the defendant originally intended to indemnify them; and, if so, the subsequent withdrawal by the defendant of such indemnity, whether right or wrong, could not have the effect of discharging him from his original *responsibility. Add to this that, on the 24th of January, the defendant calls on the plaintiffs, and expressly tells them to go on with the distress, and he will give them a further guaranty.

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And we think this evidence brings the case before us within the principle laid down by the Court of Queen's Bench, in *Betts* and another v. *Gibbins* (1), that where an act has been done by the

plaintiff under the express directions of the defendant, which occasions an injury to the rights of third persons, yet if such act is not apparently illegal in itself, but is done honestly and *bonâ fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof. We therefore think that upon the first issue the verdict must be entered for the plaintiffs.

The second issue is, whether the defendant assented to the employment by the plaintiffs of Messrs. Warlters, to make the seizure and distress. As to which, the evidence was, that the warrant was originally directed to Messrs. Toplis or their agent, which implied a power to depute their authority to some one. On the 21st of January the defendant has notice that the goods had been removed from the premises to the warehouses of Warlters & Co. preparatory to a sale. No dissent is expressed on the part of the defendant. On the 23rd a clerk of Messrs. Warlters calls on the defendant, and informs him that one of the claimants had demanded the delivery of the goods under a note from him the defendant, when the defendant answers that Messrs. Warlters & Co. were to go on with the defendant's instructions till the same were countermanded: and again, on the 25th, there is a personal communication between the defendant and Messrs. Warlters & Co. We think these circumstances furnish abundant evidence *for the jury to find this issue in favour of the plaintiff.

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An objection however was made, that in the altered and erased state of the warrant there was no legal evidence of the appointment of Messrs. Warlters. But we think as the alterations made were capable of proof, if not actually visible on the warrant, the reason and occasion of making them might also be explained to the jury; and that the result of the alteration was, that Messrs. Warlters were substituted for Messrs. Toplis the plaintiffs. Notwithstanding this objection, therefore, we think the verdict may stand.

The eighth and the eleventh issue each depend upon the same consideration. The defence set up in the eighth plea, which is pleaded to the first count, is, that the plaintiffs were damnified through the negligence, misconduct, and default of themselves and their servants. The defence set up by the eleventh plea, which is pleaded to the *indebitatus* counts, is, that the work and labour, &c. of the plaintiffs became wholly useless to the defendant, through their want of care and skill. Both these issues therefore depend on this consideration,—was it the duty of the plaintiffs or their

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agents to ascertain that the goods seized were not privileged by law before they made the seizure? and we think that although such duty may be cast upon the broker in cases of ordinary distresses for rent, or at all events the duty of using proper care and diligence in ascertaining that the distress may be safely made, yet in this case the defendant by his conduct dispensed with it: for he knew the circumstances under which the goods were taken to and left upon the premises, and with such knowledge he directed the plaintiffs or their agent to seize all the goods found on the premises for the rent due; thereby removing all suspicion, or motive for inquiry, on the part of the plaintiffs. These issues, *therefore, we also think should be found for the plaintiffs.

Upon the whole, we think that the plaintiffs are entitled to judgment in the manner above stated.

Judgment for plaintiffs (1).

1839.
May 23.

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EDWARDS v. THE BISHOP OF EXETER AND EDWARD JAMES TODD, CLERK.

(5 Bing. N. C. 652—666; S. C. 7 Scott, 652; 3 Jur. 725; 9 L. J. (N. S.) C. P. 87.)

Where a Protestant and a Roman Catholic are co-patrons of an advowson, the right of presentation is in the Protestant alone.

QUARE IMPEDIT. The first count of the declaration, after showing that, at the time of the last avoidance, the plaintiff and one William Knight were seised of the advowson of the church of Combpyne therein mentioned, as of fee, in equal moieties, as tenants in common, proceeded to allege that, on the 11th of November, 1836, the said church became vacant by the death of Edward Cook Forward, the then last incumbent of the said church, by means whereof, and because the said W. Knight, at the time when the said church so became vacant, as last aforesaid, was and from thence continually had been and still continued a person professing the Roman Catholic religion, it did and doth belong to the plaintiff to present a fit person to the said church at this vacancy; but the defendants unjustly hinder and disturb her therein.

The defendants,—the ordinary, and clerk collated by him,—pleaded that, at the time when the church became and was vacant

(1) Judgment was also given on the 3rd, 4th, 5th, 6th, 7th, 9th, and 10th issues; but they raised principally

questions of fact, and have therefore been omitted in this report.

by the death of Edward Cook Forward, the said W. Knight and the plaintiff remained, continued, and were so severally and respectively seised of and in the said church continually until and *at and after the time of the collation hereinafter mentioned, whereof the said Bishop at all times had notice. That the said church became vacant by the death of E. C. Forward on a certain day, to wit, on the 9th of November, 1836, and continued so vacant thence until the 28th of October, 1837. That afterwards, and before six months had elapsed after the said vacancy, to wit, on, &c., the plaintiff presented to the said Bishop, as and being such ordinary, to be by him as such ordinary admitted, instituted, and inducted into the said church, a certain clerk, to wit, one Richard Bradley. That thereupon, and because the said W. Knight had not joined or in any manner concurred in the said presentation of R. Bradley to the Bishop to be by him so admitted, instituted, and inducted, and not otherwise, the said Bishop then declined and refused to accept and rejected such presentation of the said R. Bradley, as it was lawful for him to do; and then and there on that occasion declared and assigned his the said Bishop's reason and ground for so declining and refusing to accept, and for so rejecting such presentation, to be the neglect and omission of the said W. Knight to concur or join in the said presentation. That afterwards, and before the said 28th of October, on the 10th of May, in the year last aforesaid, more than six months elapsed from the commencement of the said vacancy. That no presentation whatsoever of a clerk to the said Bishop to be admitted, instituted, and inducted into the church, except as in this plea aforesaid, hath at any time been made, submitted, or tendered to the said Bishop. That afterwards, to wit, on the said 28th of October, 1837, the said Bishop collated the said church so vacant to the said Edward James Todd, for that the six months after the avoidance of the said church were before then fully elapsed, so that the right of collating had devolved to the said Bishop or ordinary of that place, as it was *lawful for him to do. That although true it was that the said W. Knight, at the time when the said church became vacant, was and thence continually had been and still continued a person professing the Roman Catholic religion, yet the Bishop said that no notice thereof whatever was given to the said Bishop until long after the right of collating the said church so vacant to the said Edward James Todd, clerk, had devolved to the said Bishop, as such ordinary as aforesaid. Verification.

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The plaintiff replied, that notice that the said W. Knight was a person professing the Roman Catholic religion was given to the said Bishop before any right of collating the said church, so vacant, to the said Edward James Todd had devolved to the said Bishop, as such ordinary as aforesaid, and before the plaintiff presented to the said Bishop the said Richard Bradley, her said clerk.

Demurrer and joinder.

Kelly, in support of the demurrer. * * *

[658] *Manning*, *contra*. * * *

[661] *Kelly*, in reply. * * *

Cur. adv. vult.

TINDAL, Ch. J. :

[*662] The first count of the declaration in this case, after showing, by the deduction of title, that at the time of the last avoidance the plaintiff and one William Knight were seised of the advowson therein mentioned, as of fee and right in equal moieties, proceeds to allege, that the church became vacant by the death of the last incumbent, "by reason whereof, and because the said William Knight, at the time when the said last mentioned church so became vacant as last aforesaid, was, and from thence continually has been and still is, a person professing the Roman Catholic religion, it did and doth belong to the plaintiff to present a fit person to the said last mentioned church at this vacancy," and then avers the disturbance of the plaintiff's *right to present by the defendants. The two defendants, namely, the ordinary and the clerk collated by him, join in pleading; and in their plea to this count justify the refusal of the ordinary to admit or institute the clerk who had been presented by the plaintiff, and the rejection of such presentation, "because the said William Knight had not joined nor in any manner concurred in the said presentation; and that he, the Bishop, on that occasion, declared and assigned his reason and ground for so declining and refusing to accept, and for so rejecting such presentation, to be the neglect and omission of the said William Knight to concur or join in the said presentation:" And after proceeding to state the collation of the said church to the defendant Todd, the plea alleges, "that no notice whatever was given to the said Bishop until long after the right of collating the said church so vacant to the defendant Todd had devolved to the said Bishop as such

ordinary." Upon which latter allegation, the plaintiff in his replication takes a precise issue in the terms of the plea, alleging, "that notice had been given to the Bishop before any right of collating the said church so vacant to the other defendant had devolved to him." To which replication the defendants demur. And, so far as relates to the replication, we can see no objection in point of form to the issue taken by the plaintiff. The defendants have rested their justification on the ground of the absence of notice that Knight was a Roman Catholic before the lapse incurred. If it was incumbent on the plaintiff to have given such notice at the time of the presentation of his clerk, (for which, however, we can see no reason or authority,) the defendants themselves should have alleged and relied upon the absence of such notice in their plea. But they have not so done: and the plaintiff has only followed the defendants in denying their allegation as it stands, as he, the plaintiff, had a right to do. *But the objection to the replication has been, in effect, abandoned; and the argument on the part of the defendants has been entirely confined to the insufficiency of the plaintiff's title to present, as set forth in the declaration; the objection amounting simply to this, that the presentation was made by the plaintiff alone, whereas at the time of the presentation there was, as it is contended, a tenant in common of such right of presentation with the plaintiff, who ought to have joined with him; and that, by reason of such tenant in common not joining, a lapse incurred. The point at issue between the parties, therefore, comes to this: whether the right of presentation is given to the universities by the statutes 3 Jac. I. c. 5, 1 W. & M. c. 26, and 12 Ann. st. 2, c. 14, in the case of the disability of one co-patron only out of many; or whether it is so given only in the case where a sole patron, or all who have the right of patronage, is or are disabled by professing the Roman Catholic religion. And the first observation that arises is, that as the words of the disabling clause in the statute of James are general, clearly extending to and comprising every person that is a popish recusant convict, that is, as enlarged and explained by the subsequent statutes, every person professing the Roman Catholic religion, it follows that all which was intended to be effected by the Legislature is completely accomplished, where there are several joint tenants or tenants in common of the right of patronage, by holding the statute in those cases to affect no more than the simple disability of all the co-patrons who are Roman Catholics. For if the right of presentation, by the operation of the

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disabling clause, becomes limited to the Protestant co-patrons only, the avoiding of any popish bias or influence in the selection of an incumbent, which is the real object of the statute, is attained as completely as if the right of presentation as to the share or portion of the Roman Catholic co-patron *is given over to the Universities. There is, therefore, no necessity, in order to effectuate the object of the Legislature, that the presentation in such case should be held to vest in the Universities; and the question, therefore, becomes this, whether the words of the statute require that interpretation. And upon this point it appears to us there is a marked distinction between those words of the clause which confer the presentation on the University and those of the disabling clause. The clause in the statute of James, which gives the presentation to the University, enacts, that the University shall have the presentation "when it shall happen to be void during such time as the patron thereof shall be and remain a recusant convict as aforesaid;" and although these words are not repeated in the statutes of William and Mary and of Anne, still we consider them as virtually incorporated therein, as a direct reference is made in both the latter statutes to the statute of James, and they are declared to have been passed in order to carry into effect the intention of the former law. And we cannot but think that it will give full force and effect to this transferring or vesting clause of the statute, if it is considered as extending no further than to the case where the patron, if a sole patron, is a Roman Catholic, or where all the patrons, if there are several claiming under the same title, are of the same persuasion. And this observation is entitled to more weight when it is considered that the statute of James gives no interest, but a power only, to the Universities, as is observed by HOBART, Ch. J. in the case of *Duncombe v. The University of Oxford* (1): and it is well established that the words creating a power must be strictly interpreted: and undoubtedly it will be found, in all the cases and precedents which have occurred in courts of law, that the *claim of the Universities has been made only where there has been a sole patron who was a recusant convict. (See Winch's Entries, 771, Lutwyche, 1100, in a *quare impedit* against the chancellor, &c., of the University of Cambridge; the case in Hob. 126, and that in Winch's Rep. 11.) And, so far as we have been able to search, no precedent is found of a claim by the University under a joint right to present with a Protestant co-patron.

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(1) Winch, 11.

But, still further, the interpretation contended for on the part of the defendants would work an injury to the patronage of the Protestant co-patron. For, by sect. 5 of the 1 W. & M., the chancellor and scholars shall not present or nominate any person who shall then have any other benefice with cure of souls, under pain of the presentation being utterly void. And again, by sect. 6, it is enacted that no person so presented to any benefice with cure of souls shall be absent from the same above the space of sixty days in any one year, under the penalty that the benefice shall become void. And these two restrictions, which are very properly placed upon the power of presentation, when the University takes the whole, throw a burden upon the right of presenting belonging to the Protestant co-patron, which did not exist before. And as there could be no possible reason for an enactment which should operate against the rights of a Protestant co-patron, we think these clauses afford a key to the meaning of the statute, and show that the Legislature had nothing in view beyond giving the power to the Universities to present, where, by the recusancy of the patron, or all the patrons, under the same title, the whole power of presentation would devolve to them.

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Upon the whole, therefore, we think that the case of the transfer to the Universities of the power to present, when one or some only of the co-patrons are disabled, is either a *casus omissus* in the statute, and then we cannot *extend the statute to comprehend it; or that the Legislature designedly excluded it and confined the vesting of the power of presentation in the Universities to a vesting of the entire right; in either of which cases the judgment must be for the plaintiff.

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And by this construction no injury can be occasioned in any case to the ordinary, who at all times has a clear course to follow, perfectly free from all doubt, whereby he can never be treated as a disturber, viz. the admitting and instituting the presentee of the one Protestant co-patron; for, according to Co. Litt. 186 b, "if one joint tenant, or tenant in common, present severally, the ordinary may either admit, or refuse to admit, such a presentee, unless they join in presentation; and after the six months he may in that case present by lapse."

Judgment for plaintiff.

1889.
June 12.

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MUSKETT v. HILL AND TOZER (1).

(5 Bing. N. C. 694—712; S. C. 7 Scott, 855; 9 L. J. (N. S.) C. P. 201.)

1. A licence to search for and raise metals, and also to carry them away and convert them to the licensee's own use, passes an interest which is capable of being assigned.

2. A licence to mine was granted, with a proviso that if the grantee, after notice to work according to his covenant, failed to keep six miners at work, and the grantor fixed notice on the premises that he intended to avoid the licence, it should be lawful for the grantor to re-enter within a month after fixing the notice, and then the licence should be void: Held, that notice to the grantee that unless he kept six miners at work, the grantor would re-enter at the expiration of a month, did not avoid the licence or render the grantor's re-entry lawful.

THIS was an action upon the case for the obstruction of the plaintiff in the exercise and enjoyment of certain licences and authorities to work certain mines.

The plaintiff, in his declaration, after setting out that, by an indenture between the defendant Hill of the first part, the defendant Tozer of the second part, and certain persons of the name of Setree and Stacy of the third part, the defendants, according to their interests, granted to Setree and Stacy, their executors, administrators, and assigns, first, licence and authority to mine and search for, or cause to be raised, sought for, brought to grass, and made merchantable, all tin and tin ore, &c. within certain lands therein described; secondly, licence and authority to carry away the said metallic minerals, and convert them to their own use; with other licences not material to the present question; to hold for twenty-one years from the 18th of February, 1835; and further setting out an assignment by indenture of the rights and interests of Setree and Stacy to the plaintiff, and that the plaintiff afterwards commenced the exercise and enjoyment thereof; stated as a breach, that whilst the plaintiff was so entitled as aforesaid, and was actually engaged in using and exercising the same, the defendants wrongfully obstructed and prevented the plaintiff from using or enjoying the said licences, authorities, and privileges, *by dispossessing and expelling the plaintiff and his workmen, and by forcibly preventing and hindering the plaintiff and his servants from having any access to, or in any manner working, mining, or seeking for, the said tin or other minerals.

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(1) Followed in *Heap v. Hartley* [1896] 2 Q. B. 179, 65 L. J. Q. B. 513 (1889) 42 Ch. Div. 461, 58 L. J. Ch. (affirmed C. A. [1897] 1 Q. B. 175; 790; and in *Smelting Co. of Australia* 66 L. J. Q. B. 137.—R. C.
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The defendants craved *oyer* of the first-mentioned indenture, in which was contained, amongst others, the following proviso: "Provided always, that if there shall be any failure or breach by the grantees or their assigns in the performance of any of the covenants,—and as respects the covenant No. 1, a failure after notice so to work, to keep six able miners constantly employed in driving the adits or sinking the deepest level, shall be considered one of the breaches thereof,—and notice in writing shall be fixed within the limits aforesaid, that the grantors intend to avoid the licences hereby granted because of such failure or breach; then after the expiration of one month from the affixing such notice, and as often as the same shall happen,—notwithstanding the waiver of any prior forfeiture,—it shall be lawful for the grantors to re-enter, &c. And after such re-entry all the licences, &c. shall be conclusively determined and avoided."

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The covenant referred to as covenant No. 1 was in substance a covenant, constantly and *bonâ fide* to mine and search for all lodes, veins, and strata of metallic minerals within the limits, and effectually to work according to the laws of good mining.

The defendants pleaded, first, not guilty: secondly, that the indenture of assignment was not the deed of Setree and Stacy: thirdly, that the rights, shares, and interests of Setree and Stacy did not, nor did any of them, become vested in the plaintiff; nor did the plaintiff, at any time after the making of the second indenture, commence the exercise and enjoyment of the same; nor was the plaintiff, at the time of the committing of the grievances complained of, employed in using or enjoying the same. *The fourth plea stated, that during the term granted, and before the making of the indenture secondly mentioned, to wit on the 1st of January, 1836, and from thence until the 6th of April, and the affixing of the notice as after mentioned, Setree and Stacy did not nor would constantly and *bonâ fide* mine and search for, &c. all lodes, &c.; and so set out a breach of the covenant No. 1, and stated, that the said covenant during all the time aforesaid continued and remained broken; and that thereupon the defendants during the continuance of the said term, to wit on the 6th of April, 1836, caused notice in writing to be affixed within the limits, to wit on a certain whim (being the principal erection or building within the limits), and thereby gave notice to the said Setree and Stacy, and to all others whom it might concern, so to work, and that unless they did thenceforth keep six able miners constantly

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employed in driving the adits and sinking the deepest level within the said limits, and also in all other respects work all lodes, veins, and strata of all metallic minerals within the said limits, according to the true intent and meaning of the covenant No. 1, and observe and perform all other the covenants in the said first-mentioned indenture contained on the part of the said Setree and Stacy, the defendants would, in pursuance of the said proviso, after the expiration of one month from the affixing of the said notice within the limits aforesaid, re-enter into the said limits and premises, and avoid and determine all, every, and singular the licences and authorities by the said first-mentioned indenture to them granted and demised, and eject and expel from the same limits all persons claiming under the authority of the said indenture. It was then averred, that Setree and Stacy did not, nor did the plaintiff or any other person, from and after the affixing of such notice, keep six able miners constantly employed in driving the adits, or making the *deepest levels within the said limits, nor work nor search for minerals, according to the true intent and meaning of the said first-mentioned indenture, and of the covenants, provisoes, and agreements therein contained; but that they wrongfully failed, after such notice and affixing, so to do, contrary to the said covenant and proviso, for a longer time than one month after the affixing of the said notice as aforesaid. And the defendants further said, that afterwards and after the expiration of one month from the affixing of such notice as aforesaid, and during the continuance of the estate of the grantor, and six able miners not having been kept and employed by any person or persons as aforesaid, and the said covenant being so broken as aforesaid, the defendants, in pursuance of the power contained in the first-mentioned indenture, on the said first day when, &c. entered into the said tenements and premises thereby granted, and the same had again, repossessed and enjoyed, as absolutely forfeited, and then determined the said licences and authorities. The plea then proceeded upon this ground to justify the several other grievances mentioned in the declaration; and further stated, that the indenture secondly mentioned was not within six months from the date thereof tendered for registry to the defendants, their stewards, agents, or solicitors, according to a proviso in the first-mentioned indenture contained.

The plaintiff joined issue on the three first pleas, and replied to the fourth, that Setree and Stacy did, from and after the affixing of such notice as in the plea mentioned, keep six able miners

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constantly employed in driving the adits and sinking the deepest level within the said limits, &c., and did work and search for minerals according to the true intent and meaning of the indenture and the covenants therein contained.

MUSKETT
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At the trial before Lord Denman, Ch. J., Launceston *Assizes, 1838, it appeared that, by indenture of the 18th of August, 1835, between the defendant Hill of the first part, the defendant Tozer of the second part, and Setree and Stacy of the third part, the defendants, according to their respective interests demised and granted to Setree and Stacy, their executors, administrators, and assigns, among other things, licence and authority to mine and search for, or cause to be raised, sought for, brought to grass, and made merchantable, all tin and tin ore within certain lands therein described, and also to carry away the said metallic minerals and convert them to their own use; rendering therefore to the grantors a certain portion of the produce; with an express proviso that such licences and authorities should be assignable by deed; to hold the same for twenty-one years from the 13th of February, 1835. Setree and Stacy covenanted, among other things, constantly and *bonâ fide* to mine and search for all lodes, veins, and strata of metallic minerals within the limits described, and effectually to work the same according to the laws of good mining: and it was provided that if there should be any failure or breach by the grantees or their assigns in the performance of any of the covenants (and, as respected the covenant above set forth, a failure, after notice so to work, to keep six able miners constantly employed in driving the adits or sinking the deepest level, was to be considered one of the breaches thereof), and notice in writing should be fixed within the limits described, that the grantors intended to avoid the licences thereby granted, because of such failure or breach, then, after the expiration of one month from the affixing such notice, and as often as the same should happen, notwithstanding the waiver of any prior forfeiture, it should be lawful for the grantors to re-enter, and after such re-entry, the licences should be conclusively determined and avoided.

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Setree and Stacy having failed to mine according to their covenant, the defendants, on the 6th of April, 1836, affixed on the whim of the mine a notice addressed to Setree and Stacy, and all others whom it might concern, constantly and *bonâ fide* to mine and search for all lodes, veins, and strata of metallic minerals within the limits described, and effectually to work according to the laws

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of good mining ; and that, unless they did thenceforth keep six able miners constantly employed in driving the adits and sinking the deepest level within the said limits, and also in all other respects work all lodes, veins, and strata of metallic minerals, within the said limits according to the true intent and meaning of the covenant No. 1 above set forth, and observe and perform all other the covenants in the indenture of August 18, 1835, the defendants would, in pursuance of the above proviso, after the expiration of one month from the affixing of the said notice, re-enter into the premises, and avoid and determine all the licences and authorities granted and demised by the said indenture, and would eject and expel all persons claiming under the authority of the said indenture.

In consequence of this, negotiations took place between the parties, and Setree and Stacy agreed to assign their interest in the premises to the plaintiff. A deed of assignment was drawn up, which Stacy executed in June, and Setree on the 27th of July.

But on the 8th of July, the defendants alleging that six men had not been kept at work within a month after the notice, entered into possession of the mine ; forcibly turned out the workmen who were there ; and subsequently refused to allow the plaintiff or his workmen to enter for the purpose of mining.

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A verdict was found for the plaintiff on the three first pleas, and for the defendants on the fourth ; but, the defendants having taken out a summons to have the verdict *entered for them on the third, it was agreed between the counsel on both sides that the Court should decide upon that question, as well as upon the other, which the plaintiff intended to raise, as to the sufficiency of the fourth plea : and

Bompas, Serjt., moved for judgment *non obstante veredicto*, on the fourth plea, on the ground that the notice there set forth was not a notice absolutely to determine the lessee's interest in the mine, but merely a conditional notice that the interest should be determined unless six miners were employed ; that it was uncertain whether such notice would be acted on, or waived ; and that, according to the proviso, the only answer to the plaintiff's declaration would be a notice that the lessor had actually determined the lessee's interest : he also moved for a new trial, on the ground that the evidence did not support the fourth plea ; upon which it became unnecessary for the Court to pronounce an opinion.

A rule *nisi* having been granted,

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Wilde, Serjt., Erle, Crowder, and Butt, showed cause in Michaelmas and Hilary Terms. * * *

Bompas and Barstow, in support of the rule. * * *

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Cur. adv. vult.

TINDAL, Ch. J. (after stating the pleadings as *ante*, p. 833, *et seq.*):

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Upon the trial of the cause, the plaintiff had a verdict on the three first issues, and the defendants on the fourth; and thereupon a rule *nisi* was obtained on the behalf of the plaintiff for judgment *non obstante veredicto*, by reason of the insufficiency of the fourth plea, or for a new trial, on the ground that the evidence did not warrant the finding of the jury on the fourth issue.

On showing cause, it was insisted by the defendants that they were entitled to have had a verdict on the third plea, on two grounds; first, because the interest granted to Setree and Stacy was not assignable by law; secondly, because the expulsion complained of took place, as it was alleged, before the execution by Setree of the deed of assignment, though after the execution thereof by Stacy.

It was further insisted on their part that the fourth plea contained a sufficient answer to the plaintiff's action, and that the evidence was sufficient to support the verdict.

The first point, therefore, which presents itself for our consideration is, whether the interest conveyed to Setree and Stacy was capable of being assigned. No authority was cited to show that the interest was not assignable; but the case of *Doe d. Hanley v. Wood* (1) was relied on as establishing that the grant from the defendant Hill operated strictly and merely as a licence; and it was contended, that a licence was, in its nature, personal and not assignable. In the case referred to, the indenture relied on did not, perhaps, substantially differ from that now under discussion, and that indenture was held not to amount to a demise of the mine, so as to entitle *the grantee to maintain an ejectment; and it was in that case said by the Court to be "nothing more than a grant of a licence to search and get (irrevocable, indeed, on account of its carrying an interest), with a grant of such of the ore as should be found or got, the grantor parting with no estate or interest in the mines, metals, and minerals."

[*707]

(1) 21 R. R. 469 (2 B. & Ald. 724).

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v.
HILL.

Now, assuming this description of the instrument to be correctly applicable to the deed now under consideration, it is to be observed, that the deed in this case operates not merely as a licence, but as a grant also; and this view is conformable to what is laid down in Vaughan Rep. 351, in the case of *Thomas v. Sorrell*, where it is said, "a dispensation or licence properly passes no interest, but only makes an action lawful which without it had been unlawful; as a licence to go beyond the seas; to hunt in a man's park; to come into his house; are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park, and carrying away the deer killed to his own use; to cut down a tree in a man's ground, and to carry it away the next day after to his own use; are licences as to the acts of hunting and cutting down, but as to the carrying away the deer killed, and tree cut down, they are grants." And that such a grant to a man and his assigns carries an interest which is assignable, appears from *Palmer's* case (1), reported also in Cro. Eliz. 819, under the name of *Basset v. Maynard*. In that case, Sir Thomas Palmer being seised in fee of a wood, bargained and sold to one Cornforth and his assigns, 600 cords of wood, to be taken by the assignment of Sir Thomas Palmer. Cornforth assigned his interest to the plaintiff. And the first resolution in the case was, that Cornforth had an interest which he might *assign over, and not a thing in action or a possibility only. And the case of *Grantham v. Hawley* (2) leads to a similar conclusion.

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At this point of the argument various cases were cited in order to establish the point, that the deed in question did not convey such an interest as that a covenant relating to it would run with the interest so as to bind the assignee or to entitle him to take advantage of it. As to which point, it is sufficient to say, that it is not the question now before us; and the only point for our consideration is, whether the interest was capable of being assigned. And it is not unworthy of observation, that it is so treated and considered by the parties themselves, as there is an express proviso in the original grant, that the licences and authorities shall be assignable by deed, amongst other modes of assignment.

We come now to the second ground on which the defendants insisted that they were entitled to a verdict on the third plea, as to which the material facts were, that after the deed of assignment had been executed by Stacy, but before it was executed by Setree, the defendant entered into the possession of the mine, and turned

(1) 6 Co. Rep. 25.

(2) Hob. 132.

the workmen out; and evidence was given of a subsequent general refusal to allow the plaintiff or his workmen to enter for the purpose of mining. The contention on behalf of the defendants was, that at the time of the wrong complained of, the interest of Stacy only had been assigned, and not the interest of both parties; and, consequently, that the assignment as alleged was disproved; and to make out this point, the case of *Curtis v. Spitty* (1) was relied on as being in point.

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HILL.

On the part of the plaintiff, it was maintained, that *however the case might be in an action founded on contract, it was different in an action of tort; and the case of *Ricketts v. Salwey* (2) was relied on, where it was said by Lord Ch. J. ABBOTT, "The general rule of pleading in cases of tort is, that it is sufficient if part only of the allegation stated in the declaration be proved, provided that what is proved affords a ground for maintaining the action, supposing it to have been correctly stated as proved." But it was further urged by him, that the action in this case was brought for preventing the plaintiff from using and enjoying the licences and authorities, not only by dispossessing and expelling the plaintiff and his workmen, but also by forcibly preventing and hindering him and his servants from having access to, or in any manner working the mine; that the allegation in the plea, that the rights and shares of Setree and Stacy did not, nor did any of them, become vested in the plaintiff, does not point to any particular time; and that it is sufficient to support the verdict on this plea, for the plaintiff, if any substantial ground of action accrued after the assignment was executed by Setree and Stacy. And it appears to us that this latter view is correct, and that the facts proved agree with the pleadings in the present case; and there having been a subsequent general refusal to allow the plaintiff and his workmen to enter and search for ore, this issue seems to us to have been properly found for the plaintiff.

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Another point was incidentally suggested on behalf of the defendants, though not much insisted upon, that an action on the case, under the circumstances, was not maintainable, but that the action should have been an action of covenant or an action of trespass. It is not material to inquire whether, in this case, an action of covenant could be maintained; for, assuming that it might, it would not follow from thence that an action on the case might not also lie. On the contrary, it *has been decided, that a party may, in some cases, have his election, and bring either covenant or case:

[*710]

(1) 1 Bing. N. C. 756.

(2) 2 B. & Ald. 361; see 22 R. R. 800.

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see *Kinlyside v. Thornton* (1). And, in the present case, the interest granted being assignable, the assignee has a right to enter on the land and exercise his licence; and if the owner of the soil prevents him, it is a wrong, for which an action on the case will lie, on the established principle of our law, that in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages, Com. Dig. Action on the Case, A.

The ground on which it was maintained that trespass, and not case, was the proper remedy, was this; the work people at the mine, it is said, were forcibly expelled from the possession of the mine, which is a trespass: *Harker v. Birkbeck* (2); and the continued refusal to allow the re-entry of the parties entitled is a continuing trespass, and therefore not the proper foundation for an action on the case. The answer given to this objection appears to us to be sufficient, namely, that evidence was offered of a general refusal to allow the plaintiff to enter upon any part of the land comprised within the limits; that sometimes a man may have an action upon the case, or of trespass, at his election, for which Com. Dig. tit. Action, M. 2, and 1 Salk. 10, are authorities; and that, even supposing the turning the miners out of the mine might, under the circumstances, have furnished grounds for an action of trespass, the refusal generally to allow the plaintiff to exercise the liberties granted, which might be in other parts than the mine itself previously worked, would furnish sufficient ground for maintaining an action on the case.

[*711] The questions which arise on the other issues being decided in the plaintiff's favour, it remains to consider *whether the fourth plea is sufficient in point of law; which depends upon this, whether the notice set out in the fourth plea was a sufficient notice, so as to determine the interest created by the first mentioned indenture. It is admitted in this case, that a forfeiture had been incurred, and that the grantor was entitled to determine the grant by giving a proper notice. If a notice had been given, to the effect that a breach of covenant had been actually committed, and that, in consequence thereof, the grantor had elected to determine the grant at the end of a month, no question could have arisen, but that the interest of the grantee had been put an end to; he would have had a month's time to remove his machinery, and at the end of that time he must have quitted the premises. But the notice actually

(1) 2 W. Bl. 1111.

(2) 3 Burr. 1556.

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HILL.

given contains no intimation of an election to determine the grant on account of the forfeitures which had been incurred; but only upon the happening of a certain contingency, which might or might not take place; that is to say, if a further breach of covenant should be committed, he, the grantor, would enter after the expiration of a month from the affixing of the notice.

Now it is obvious, that the two notices directed by the proviso are, in their nature, essentially different. It is one thing to say, You have committed a breach, and therefore I will turn you out at the end of a month. It is quite another thing to say, If you shall at any time hereafter commit a forfeiture, I will turn you out at the expiration of a month after such forfeiture. Where an act has been done, or omitted to be done by the grantee, whereby a forfeiture has been incurred, it is in the power of the grantor to waive the forfeiture, or to take advantage of it; and the object of requiring a notice to be given seems to be, that a month's time may be allowed to the grantee to remove his goods after the grantor has definitively elected to vacate the grant, at a fixed and definite day. But the notice that has been given in this case binds the landlord to nothing; if a further breach of covenant is committed, he may waive it, or not, at his election: the grantee does not know whether he is to quit or not, or at what time he is to quit. And to hold this notice to be sufficient, would be in effect to deprive the plaintiff of the whole benefit of the clause in question. We think, therefore, that the notice was insufficient.

[*712]

The remaining question for consideration is, whether the plaintiff is entitled to a judgment, notwithstanding the verdict for the defendants on the fourth plea; and the plea being bad in substance, the only inquiry is, whether it contains a sufficient confession of all the material allegations of the plaintiff's declaration; and it seems to us that the plaintiff's cause of action is confessed by the plea, and that the avoidance is insufficient, not in form but in substance; and, therefore, that the plaintiff ought to have judgment upon the whole record, *non obstante veredicto*.

Judgment for plaintiff.

SITTINGS IN BANC AFTER TERM.

1839.
June 13.

[713]

SHARP *v.* NEWSHOLME AND OTHERS, ASSIGNEES OF
BAILY, A BANKRUPT.

(5 Bing. N. C. 713—715; S. C. 8 Scott, 23; 9 L. J. (N. S.) C. P. 211; 3 Jur. 581.)

Plaintiff, at the recommendation of B., sent goods to a dyer, who was told by plaintiff's son that B. would give directions about them: B. called, and gave directions; and afterwards became bankrupt: in trover for these goods brought by plaintiff against B.'s assignees: Held, that the directions given by B. were admissible in evidence for the assignees.

TROVER for sundry pieces of worsted stuff.

Plea, that the goods were not the property of the plaintiff.

At the trial before Williams, J., the plaintiff proved that he had purchased the goods, and was in possession of them, when, in consequence of a recommendation from Baily, they were sent to a dyer's, who was told by the plaintiff's son that Baily would call and give directions about them. Baily called and gave directions; and having afterwards become bankrupt, the defendants, his assignees, claimed the goods, and now called the dyer as a witness to prove what directions Baily had given. The plaintiff's counsel objected to this evidence, which the learned Judge rejected, and a verdict was found for the plaintiff, which

R. Alexander obtained a rule *nisi* to set aside, on the ground that the directions were part of a transaction in which the bankrupt had been found dealing with the goods, and therefore ought to have been received in evidence, at least as tending to show who was reputed owner.

Starkie and *Tomlinson* showed cause:

As Baily was never in possession of the goods, the question of reputed ownership did not arise; and as he was not proved to be the plaintiff's agent for disposing of the goods or otherwise, his declarations, made in the absence of the *plaintiff, were properly rejected. They were no part of the *res gestæ*, and if they applied to any thing beyond the colours to be given to the goods, were out of the scope of Baily's authority.

[*714]

R. Alexander and *Hoggins* contended that the directions were admissible as accompanying Baily's act of going to the dyer with the plaintiff's concurrence: *Thomas v. Connell* (1).

(1) 4 M. & W. 267.

TINDAL, Ch. J. :

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v.
NEWSHOLME.

It is very difficult to draw a precise and defined line between a declaration and a direction. If Baily gave directions, even as to colours, that was a dealing with the goods; and as it was material to know who was dealing with the goods, I think the evidence was admissible, and should have been submitted to the jury, *valeat quantum*.

BOSANQUET, J. having been absent during the argument, pronounced no opinion.

COLTMAN, J. :

It appears to me that any directions given by Baily ought not to have been withdrawn from the jury.

ERSKINE, J. :

Two things must be made out to bring a transaction within the seventy-second section of the Bankrupt Act (1); first, that the bankrupt took on himself the order and disposition of the property; and, secondly, that he did so with the consent of the true owner.

It is impossible to say that giving directions to the dyer would not have been some evidence that the bankrupt was dealing with the goods as his own, though it would have been unavailable unless proved to be with *the consent of the true owner. Still the defendants were entitled to have the evidence submitted to the jury, and therefore the rule for a new trial must be

[*715]

Absolute.

BROAD v. HAM (2).

(5 Bing. N. C. 722—728; S. C. 8 Scott, 40; 8 L. J. (N. S.) C. P. 357.)

The disbelief of the party making a charge before a magistrate is some evidence of want of probable cause, notwithstanding other evidence has shown that there was *prima facie* probable cause for making the charge.

THIS was an action on the case for charging the plaintiff with a felony, and procuring his committal by a magistrate, maliciously and without reasonable or probable cause.

At the trial, it appeared that the plaintiff, who was apprenticed to the defendant, had quitted the defendant's house under circumstances which had a suspicious appearance.

(1) See now the Bankruptcy Act, *Perryman* (1870) L. R. 4 H. L. 521, 1883, s. 44, (iii.). 538, 39 L. J. Ex. 177, 180.—R. C.

(2) Cited and followed in *Lister v.*

1839.
June 14.

[722]

BROAD
v.
HAM.

At the same time the defendant missed a cheque for 10*l.*; which, after a search, was found by one of the defendant's shopmen, in the plaintiff's box. The box, however, had not been locked.

The defendant went before a magistrate, and upon his information that he had lost the cheque, and the deposition of the witness who found it, the plaintiff was committed.

At this time, 15*l.* was due to the defendant as part of the premium upon the plaintiff's articles of apprenticeship; and at the trial there was some evidence from which it might be inferred that the defendant, when he went before the magistrate, did not believe the plaintiff had committed a felony, but rather preferred the charge as a means of inducing payment of the 15*l.* which he demanded when the charge was preferred.

The learned Judge told the jury that, in order to recover, the plaintiff must show malice in the defendant, and a want of probable cause for the charge; that the absconding of the plaintiff, and the finding the cheque in his box, *primâ facie*, afforded probable cause for proceeding against him; but if the jury thought the defendant himself believed the plaintiff had not committed *a felony, that was some evidence of the absence of probable cause.

[*723]

A verdict having been found for the plaintiff,

Erle obtained a rule *nisi* to set it aside, on the ground that the jury had been misdirected in this particular; contending, that if the plaintiff had committed a felony, or stood in such circumstances that a reasonable man would believe he had committed one, the defendant's belief was immaterial with a view to the question whether there was reasonable and probable cause for the charge.

Bompas, Serjt., who was to have shown cause, being absent,

Erle, *Moody*, and *Butt*, were heard in support of the rule:

They contended, that the committal of the magistrate must have proceeded on the deposition of the witness who had found the cheque in the plaintiff's box; for the defendant's statement, that he had lost the cheque, would, of itself, have availed nothing, and his belief on the subject was equally immaterial. In *Musgrove v. Newell* (1), the defendant gave the plaintiff into the custody of a constable on a charge of having robbed him; the constable said he knew the party to be a respectable man, and would be answerable

for his appearance; the defendant persisted in having him detained, and next day took him before a magistrate, where he was discharged; and an action having been brought against the defendant, the Judge, who tried the cause, told the jury, that if they thought the defendant was satisfied with the constable's explanation, and persevered in the charge from obstinacy or wounded pride, they *should find for the plaintiff: but it was held, that this direction was wrong, for as the constable's statement did not alter the facts, the probable cause remained the same, however the defendant's mind might have been affected by that statement. Again in *Blachford v. Dod* (1), where the defendants had indicted the plaintiff for sending a threatening letter, and he, being acquitted of the charge, sued them for a malicious prosecution, and the Judge, who tried the cause, without leaving any question for the jury, decided that they had probable cause, it was held that his decision was correct, and that the evidence did not raise a question of fact for the jury, whether the defendants, *bonâ fide*, believed that they had a reasonable cause for indicting, but a pure question of law for the Judge, whether the defendants had such reasonable cause. So here, if there had been any disputed fact, the Judge should have left the effect of it to the jury: *Johnstone v. Sutton* (2); but as the facts were not controverted, he should have decided whether or not there was probable cause without reference to what the defendant thought.

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v.
HAM.

[*724]

(TINDAL, Ch. J., referred to *Taylor v. Willans* (3).)

There, the defendant absented himself from the trial of an indictment, after he had induced the grand jury to find a true bill; and the question was *quo animo*, he had preferred the bill.

TINDAL, Ch. J.:

This is an action on the case, for falsely, and without reasonable or probable cause, preferring a charge of felony against the plaintiff; and the question is, whether the learned Judge was correct in directing the jury that the defendant's disbelief of the truth of the charge was some evidence of want of probable cause. It may be assumed that the state of facts *was such, as *primâ facie* to show a probable cause for the charge; but as the charge was accompanied with the demand of a sum of money, the learned Judge said that, if from that circumstance the jury inferred the defendant believed

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(1) 36 R. R. 532 (2 B. & Ad. 179). 510).

(2) 1 R. R. 257, 269 (1 T. R. 493, (3) 31 R. R. 379 (2 B. & Ad. 845).

BROAD
H.A.M.

the plaintiff had not committed a felony, that belief would be some evidence on which they would consider, whether or not there was reasonable and probable cause for making the charge; in other words, whether a reasonable and probable cause operated upon the mind of the defendant; and I think that that was a proper direction to the jury. In order to justify a defendant, there must be a reasonable cause,—such as would operate on the mind of a discreet man: there must also be a probable cause,—such as would operate on the mind of a reasonable man; at all events such as would operate on the mind of the party making the charge; otherwise there is no probable cause for him: I cannot say that the defendant acted on probable cause, if the state of the facts was such as to have no effect on his mind. The rule of law applicable to the subject is laid down in *Johnstone v. Sutton*; and I am unable to distinguish the present case from that of *Taylor v. Willans*, where Lord TENTERDEN said, “it was left for the jury to determine, whether Taylor’s non-appearance arose from a consciousness that he had no evidence to give which would support the indictment, or from any other cause. Now, the exception ultimately taken is not that the evidence was not sufficient for the jury to draw any conclusion; but that the Judge ought to have drawn it himself. It has been carried further in the argument to-day, for it has been urged that the non-appearance of the prosecutor does not necessarily induce the conclusion of a consciousness at that time, that when the prosecution was originally instituted, he could have given no evidence to support it. That may be so. But the conduct of a party in a late period of a cause is a *material circumstance, from which his motives at an earlier period may be inferred.” “The Judge is to give his opinion on the law, and to leave the jury to determine the facts, which include the motives of the parties: and where he tells them that if they think the prosecutor had a certain motive for his conduct, then there was probable cause; but if he had not that motive, then there was no probable cause; I think such a summing up does properly separate the law from the fact, and is conformable to the rule.”

[*726]

BOSANQUET, J. :

I think the direction was right. In order to support this action there must be malice, and an absence of reasonable and probable cause; and reasonable and probable cause is a mixed question of law and fact: the facts being found or undisputed, the Judge determines whether they amount to reasonable and probable

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cause; but if the facts are doubtful, the jury must come to the conclusion of fact before the Judge determines the effect of it in law. The principle is sufficiently clear; the difficulty is in the application; but I think the Judge has rightly applied the principle here. There were certain facts which, standing alone, led him to say there was *primâ facie* probable cause for the charge: but then the charge was accompanied with a demand of money, and it was for the jury to say what inference they would draw from that fact: he therefore left it to them to say whether, after proof of that circumstance, they thought the defendant believed the charge to be true: if he did not, his disbelief was some evidence of an absence of reasonable and probable cause. What is the case of *Taylor v. Willans*? After preferring an indictment, the prosecutor omitted to appear in support of it; and it was left to the jury to say, whether the inference from that circumstance was not, that the prosecutor did not believe the charge. It has been argued that *Blachford v. Dod* and *Taylor v. Willans* are at variance with our present decision: but in *Blachford v. Dod*, Lord TENTERDEN says, "the first question is, whether I ought, under the circumstances of this case, to have decided that the defendants had or had not reasonable or probable cause for preferring the indictment against the plaintiff, or to have left that wholly, or in part, to the jury:" and the Court decided that under the circumstances of the case there was not a question for the jury, because there was no fact in dispute. Here, it was a question for the jury to say, whether the circumstances were not such as to lead the prosecutor to a conclusion that he had no reasonable or probable cause for making the charge.

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COLTMAN, J. :

It is sometimes difficult to say, whether the existence of probable cause is, in the particular instance, a question for the Judge or for the jury: but as the prosecutor would be justified by probable cause, notwithstanding the most express malice, there ought always to be an inquiry into the *bona fides* of the prosecution: that, will be determined by the Judge himself where the facts and inferences are not doubtful; as in *Blachford v. Dod*; but where the facts or inferences are doubtful, it must be determined by the jury. Suppose the case of a prosecutor who has laid a charge before a magistrate upon receiving information of the theft committed on his property; that would be *primâ facie* reasonable and probable cause for the charge: but suppose him to have said afterwards, that he knew his

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informant to be an idle and worthless fellow : that would be evidence to show not only whether he believed in the guilt of the accused, but also, whether he had reasonable and probable cause for proceeding.

ERSKINE, J. :

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I am of the same opinion. It would be a monstrous proposition, that a party who did not *believe the guilt of the accused, should be said to have reasonable and probable cause for making the charge. Here, the defendant had not expressly made a declaration to that effect ; but there were facts from which it might be inferred that such was his opinion ; and the effect of those facts ought to be left to the jury. In *Blachford v. Dod*, the whole evidence consisted of a letter written by the plaintiff, the effect of which the Judge properly took upon himself to decide : here, there were several facts in connection with the conduct of the defendant, and it was proper to leave it to the jury, whether the belief of a reasonable and probable cause was acting on his mind when he made the charge against the plaintiff. I think, therefore, that this rule must be discharged.

Rule discharged.

1839.
June 20.

[738]

BRINGLOE v. GOODSON.

(5 Bing. N. C. 738—741 ; S. C. 8 Scott, 71 ; 1 Arn. 322 ; 8 L. J. (N. S.) C. P. 364.)

In covenant on an indenture of lease which purported to be granted by J. S., in exercise of a power given by the will of P. S. : Held that defendant, by holding under the lease and executing a counterpart, admitted the due execution of the will of P. S.

COVENANT by mortgagee against lessee of mortgagor.

The lease on which the plaintiff sued, purported to be granted by James Sers in exercise of a power given by the will of Peter Sers.

James Sers and Brown, Peter Sers's executor, afterwards conveyed the premises to the plaintiff.

Under a plea raising an issue on the devise by Peter Sers, at the trial of the cause, one of the three attesting witnesses to the will was called, who said he had no recollection of seeing the testator sign the will, but believed the attestation to be his (the witness's) signature, and remembered having been at the testator's house once in the spring. The will produced bore date April 11th, 1811.

The handwriting of the second and third witness was proved ; and the third was stated to be dead by a witness, who said he was told so by members of the family, *ante litem motam*.

Objection was taken to this proof as insufficient ; but the objection was over-ruled, and a verdict having been found for the plaintiff,

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v.
GOODSON.

Balguy obtained a rule *nisi* for a new trial, on the ground, among other objections, that the witness who recognised his own signature being unable to speak to the fact of the presence of the testator, there was no evidence to go to the jury of the due execution of the will of Peter Sers.

Hill, Humfrey, and Gale, who showed cause, contended that whether the proof of execution were sufficient or not, the defendant, by executing the counterpart of a lease in which the will of Peter Sers was recited, and therefore holding under the will, had thereby admitted that it was duly executed : and the evidence of the first witness, together with the contents of the document, were sufficient to establish that the will produced at the trial was the identical will so admitted by the defendant.

[739]

Balguy, N. R. Clarke, and W. H. Watson, in support of the rule, argued, that an admission by the defendant, unless made for the purpose of the cause, would not supersede the necessity of proving the will in the regular way. An admission of a debt due on a bond will not dispense with the necessity of calling the attesting witness : *Abbott v. Plumbe* (1). But a mere introductory statement that the lease was made in exercise of a power given by will of James Sers did not amount to a recital of the will, and was therefore no admission by the defendant that the will contained a valid power : if the defendant had pleaded that there was no good demise under the power, the plaintiff could not have replied an estoppel ; and if there was no estoppel there was no admission. Such an admission, if acted on, would be an admission of any will that could be produced.

TINDAL, Ch. J. :

The only question is, whether there was *any* evidence to go to the jury on the issue of *non devisavit*, for the only ground of the motion for a new trial is, that there was *no* such evidence. It may be admitted broadly that the proper way of proving a will is, by calling the attesting witnesses to prove the circumstances *of the execution : but that is not the only way ; as where the will is admitted for the purpose of the cause ; or where it is admitted in

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r.
GOODSON. a deed under the seal of the party : and that is the case here. In the lease under which the defendant takes, there is a recital that the lessor demised in exercise of a power given him by the will of Peter Sers ; then, at the trial the will of a Peter Sers is put in, which corresponds with the recital in the lease. It is said that in this way the recital may be made to operate as an admission of any will. But there was some evidence that applied to this particular will, the witness having been at the testator's house at the time of year on which it bore date.

I do not put the admission so high as an estoppel ; but it has its effect on the principle laid down in *Shelley v. Wright* (1), where a party executing a deed was held to be estopped by the recital of a particular fact in that deed, to deny such fact.

VAUGHAN, J. concurred in thinking there was some evidence to go to the jury.

BOSANQUET, J. :

I think there was sufficient proof of the execution of this will, in the absence of any evidence to throw doubt on the fact.

One witness recognised his own signature, and was at Peter Sers's about the time of the year on which the will bore date ; and then there is a deed under the seal of the defendant, which recites a will of Peter Sers. It is clear that a recital under hand and seal, is an admission of a deed, and I do not see why it should not equally be an admission of a will. In the absence of any thing to show the contrary, I think it sufficiently appeared that the will produced was the will recited.

[741] ERSKINE, J. :

There was a direct issue on the plea of *non devisavit* ; it was for the jury to say whether there was sufficient to satisfy them of the execution of the will ; and if the identity of the will produced were disputed, the Judge should have been required to put the question on that point to the jury. There is an admission under the defendant's hand and seal, that there was such a will, and there is some evidence, though not conclusive, to show that the will so admitted was the will produced. The objection as to identity was not made at the trial ; and therefore this rule must be discharged.

Rule discharged.

REEVES v. BARRAUD AND ANOTHER.

(7 Scott, 281—283.)

1899.
Jan. 31.

[281]

A stakeholder who *bonâ fide* comes to the Court under the Interpleader Act, is entitled to his costs out of the fund or the produce of the subject-matter in dispute, to be repaid by the party ultimately unsuccessful (1).

AN action of trover having been brought by Reeves against the Messrs. Barraud, the chronometer makers, in Cornhill, to recover a chronometer that had been left with them by one Wilson, master of the *Don Giovanni*, a vessel belonging to the Messrs. Capper, and to which the plaintiff and the Messrs. Capper respectively claimed to be entitled under assignments from Wilson, and the plaintiff refusing to indemnify the defendants against the claim of the Messrs. Capper, the defendants obtained a rule under the Interpleader Act, calling all the parties before the Court to maintain or relinquish their respective claims. An issue was directed, to try the title; in which issue Reeves was plaintiff and the Messrs. Capper defendants. The verdict having been found for the defendants,

Wilde, Serjt., on a former day in this Term, obtained a rule for the delivery of the chronometer to them, subject to any lien the Messrs. Barraud might have upon it, the costs of the issue to be paid by the plaintiff.

Hoggins, for the Messrs. Barraud, claimed to be entitled also to the costs of the motion under the Act, their application to the Court being *bonâ fide*, and rendered necessary by the refusal of Reeves to indemnify them.

Kelly, for Reeves, conceded that the costs of the issue must be paid by him; but he submitted that the Messrs. Barraud were not under the circumstances entitled to the costs of their motion. The facts were these: Reeves made a *bonâ fide* advance to Wilson upon the security of an order upon Messrs. Barraud for the delivery to him of the chronometer in question, which order they so far accepted *as to consent to hold the chronometer for him. Wilson becoming bankrupt, and Reeves declining to indemnify the Messrs. Barraud, the latter obtained a rule under the Interpleader Act, calling upon Reeves and Wilson's assignees to appear and maintain or relinquish their respective claims. After the rule was obtained, Messrs. Barraud had notice of the claim of

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(1) See R. S. C. Ord. LVII., r. 15.—R. C.

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Messrs. Capper, and they were accordingly made parties to the rule. The result of the issue is as above stated, viz. that the chronometer was ultimately declared to be the property of the Messrs. Capper. Under these circumstances, there can be no pretence for saddling Reeves with Barraud's costs.

Talfourd, Serjt., for Messrs. Capper :

The Messrs. Capper are clearly entitled to have the chronometer delivered up to them, and to have all their costs. If Messrs. Barraud are entitled to costs at all, they clearly cannot be entitled to receive them from the Messrs. Capper, who were the successful party.

TINDAL, Ch. J. :

This rule must follow the principle we have already laid down in these cases, viz. that, where the stakeholder acts *bonâ fide*, he is to receive his costs in the first instance out of the subject-matter in dispute, to be borne ultimately by the unsuccessful party. In strictness, the costs of Messrs. Barraud in this case should be paid by Messrs. Capper, who would look to Reeves for them. But, as all the parties are before the Court, the better course will be to make a rule directing Reeves at once to pay Messrs. Barraud's costs. [*283] The Messrs. Capper will of *course be entitled to their costs of appearing, as well as to the costs of the issue.

VAUGHAN, J. :

It would be equally unjust to call on Messrs. Capper, who have succeeded, to pay the expense of the motion, as upon Messrs. Barraud, who were ready to give up the chronometer upon receiving an indemnity from Reeves.

The rest of the COURT concurring—

Rule absolute accordingly.

1839.
April 15.

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HUTCHINSON v. MORLEY (1).

(7 Scott, 341—342; S. C. 2 Arn. 2; 3 Jur. 288.)

A contract for the sale of fixtures and fittings of a public-house: Held, to be avoided by a false representation by the vendor as to the amount of business attached to the house, though the agreement expressly excluded goodwill.

ASSUMPSIT for money had and received to the plaintiff's use. Plea, *non assumpsit*.

The cause was tried before Erskine, J., at the sittings at

(1) Cp. *Redgrave v. Hurd*, 20 Ch. Div. 1, 51 L. J. Ch. 113, 45 L. T. 485.

Westminster after the last Term. The action was brought to recover back a sum of 20*l.*, the amount of a deposit paid by the plaintiff to the defendant on an agreement for the purchase of fixtures and fittings of a public-house (from which agreement the goodwill was expressly excluded), on the ground of an alleged misrepresentation as to the amount of business attached to the house. A witness called on the part of the plaintiff proved a conversation between the defendant, the outgoing tenant, and the plaintiff, as to the fixtures, in the course of which the defendant was asked what was the quantity of business done at the house; to which he answered—four butts of beer per month, and *from 25*l.* to 30*l.* in spirits. This was proved to be grossly false.

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The learned Judge left it to the jury to say whether or not the word "goodwill" had been erased from the agreement (the common printed form) before its execution, and whether there had been a misrepresentation as to the amount of business attached to the house.

The jury returned a verdict for the plaintiff, for 20*l.*

Andrews, Serjt. now moved for a new trial, on the ground that the verdict was against evidence :

He submitted, that, it being perfectly clear that the contract between the parties did not include the goodwill of the house, any misrepresentation as to the amount of the business, in a loose conversation having reference to a bargain for a totally different subject-matter, could not affect the validity of the contract; and consequently that there was no evidence whatever to sustain the verdict.

TINDAL, Ch. J. :

A man would not buy fixtures and fittings of a public-house without intending to become the occupier of the premises. Supposing therefore that these alone were the subject of the contract, and that the goodwill formed no part of the agreement, still I think the jury were warranted in inferring that the defendant's misrepresentation as to the trade of the house operated upon the plaintiff's mind, and was an inducement to him to purchase the fixtures. The case having been fairly left, I see no ground for disturbing the verdict.

The rest of the Court concurring—

Rule refused.

1839.
April 15.

[345]

COOPER v. TALBOT.

(7 Scott, 345—346; S. C. 2 Arn. 50.)

Where a rule is obtained upon an affidavit erroneously intituled, the Court will not discharge it, but will permit the affidavit to be amended and re-sworn.

ASSUMPSIT for money had and received, tried before the under-sheriff of Middlesex.

Gurney, in the last Term, obtained a rule *nisi* to enter a non-suit, upon an affidavit intituled "*James Cooper v. Talbot*," the plaintiff's true name being Edmund.

Balantine, before showing cause, objected that the affidavit upon which the rule was obtained, being wrongly intituled, could not be used. He cited *Phillips v. Hutchinson* (1), where "*Phillips, assignee &c.*," was held to be an irregular mode of describing the plaintiff in intituling an affidavit: LITTLEDALE, J., saying: "I think it ought to appear what kind of an assignee the plaintiff is, *in order that it may be seen whether he is an assignee of a person to whom by law he may be an assignee." And, in answer to a suggestion that the affidavit might be amended, he referred to the same case, where the same learned Judge, after time taken to consider, said: "It appears to me that the title cannot be amended. How can you have an affidavit dated one day, in support of a rule several days old, and which is supposed to have been granted on that affidavit? Great inconsistency would then appear. Then, it is said that the rule may be enlarged. There also the same objection will arise, because then it must be the original rule which is discharged or made absolute."

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TINDAL, Ch. J. :

It seems to me that it would be a very hard measure of justice to permit the rights of a party to be lost in consequence of so mere a mistake. The affidavit may be amended and re-sworn. The costs of the plaintiff's appearance here to-day must of course be paid.

The rest of the COURT concurring—

Rule accordingly (2).

(1) 3 Dowl. 20.

(2) Cause was shown on a subsequent day, and the rule for entering a

nonsuit made absolute. See now R. S. C. Ord. XXXVIII., r. 14.

WRIGHTUP *v.* CHAMBERLAIN.

(7 Scott, 598—602; S. C. 2 Arn. 28; 2 Jur. 328.)

1839.

May 8.

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The plaintiff purchased a horse of the defendant, with a warranty of soundness, and sold it with a like warranty to J. S.; some months afterwards J. S. returned the horse, finding it to have been unsound at the time of the sale; the plaintiff declining to take it back, J. S. brought an action on the warranty; the plaintiff gave the defendant notice that the horse had been returned to him as unsound, and an action brought against him on his warranty; the defendant disregarding this notice, the plaintiff defended the action brought against him by J. S., and failed. In an action against the defendant on his warranty—the jury finding that the plaintiff might, by a reasonable examination of the horse, have discovered that it was unsound at the time he sold it to J. S.: Held, that the plaintiff was not entitled to recover as special damage the costs incurred by him in the defence of the former action, such defence being under the circumstances rash and improvident.

THIS was an action upon the warranty of a horse. The declaration assigned for special damage that the plaintiff, confiding in the defendant's warranty, re-sold the horse to one Jolly with a warranty; and that, the horse proving unsound, Jolly sued the plaintiff, and recovered 89*l.*, the price of the horse, and 96*l.*, the costs of that action.

The defendant paid into Court 19*l.*, the price for which he had originally sold the horse to the plaintiff.

The cause was tried before Parke, B., at the Norwich Spring Assizes, 1838. The facts that appeared in evidence were as follow: On the 3rd September, 1836, the horse in question was sold by the defendant to the plaintiff for 19*l.*, with a warranty of soundness. On the 24th of the same month, the plaintiff sold it to Jolly for 89*l.*, with a like warranty. On the 17th July following, Jolly offered to return the horse to the plaintiff, alleging that it was unsound at the time of the sale. The plaintiff refusing to take it back, Jolly, on the 18th August, commenced an action against him on his warranty. The plaintiff afterwards took the horse back, and gave the defendant notice that the horse had been returned and the action brought, and that he should hold him responsible for the result. The defendant refusing to take back the horse, the plaintiff defended Jolly's action, which resulted in a verdict and judgment against him for 135*l.*—89*l.*, the price of the horse, and 96*l.* for Jolly's costs: which sum, and 30*l.*, the costs of his defence to that action, the plaintiff now claimed to be entitled to recover from the present defendant. There was no direct evidence that the horse was unsound at the time of the respective sales by the defendant to the plaintiff and by the plaintiff to Jolly: but it

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was proved, that, when the *horse was returned by the latter, upon a strict examination, a defect of long standing was discoverable.

On the part of the defendant, it was contended, that, inasmuch as the plaintiff might, by examination of the horse, have discovered the unsoundness, his defence of Jolly's action was heedless and improvident, and therefore the present defendant was not chargeable therewith.

On the other hand, it was submitted that the defendant's refusal to take back the horse after it had been returned by Jolly, left the plaintiff no option, but compelled him to defend: *Lewis v. Peake* (or *Peat*) (1), *Neale v. Wyllie* (2), *Smith v. Compton* (3).

Under the direction of the learned Judge (4), a verdict was found for the defendant, with liberty to the plaintiff to move to enter a verdict for the sum claimed, if the Court should be of opinion that the special damage was recoverable. By agreement it was to be taken that the jury had found—first that the plaintiff had only agreed to take the horse back from Jolly, on condition that the defendant would take it back from him—secondly, that the plaintiff might, before he defended Jolly's action, have ascertained, by a reasonable examination of the horse, that it was not sound—thirdly, that the damages did not exceed 19*l.*, unless the plaintiff was entitled to recover the damages *and costs recovered against him by Jolly, or his own costs of the defence to that action.

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Storks, Serjt., in Easter Term last, accordingly obtained a rule *nisi*.

R. V. Richards and *Gurdon*, showed cause (5) :

The special damage claimed is clearly not recoverable: the

(1) 17 R. R. 475 (7 Taunt. 153; 2 Marsh. 431).

(2) 27 R. R. 418 (3 B. & C. 533; 5 Dowl. & Ry. 442).

(3) 37 R. R. 387 (3 B. & Ad. 407).

(4) His Lordship referred to a MS. note of a case of *Boucher v. Gwillim*, K. B., June 25th, 1829. The action was brought upon a warranty on the sale of a horse, the plaintiff claiming as special damage the costs of the defence of an action brought against him on a warranty upon the re-sale of the horse. It appeared that the plaintiff had been told by a third person before he defended the action brought

against him by the party to whom he had sold the horse, that he could prove that the animal was unsound whilst it was in his possession. The jury having given full damages, the Court directed a new trial, unless the plaintiff would consent to reduce the verdict to 90 guineas, the price paid for the horse. The plaintiff declining to consent, a new trial was had. On the second trial, there being no proof of unsoundness, the defendant had a verdict.

(5) Cause was shown at the sittings in Banc after last Hilary Term, before Tindal, Ch. J., Vaughan, J., and Erskine, J.

plaintiff ought not, under the circumstances, to have defended Jolly's action. Nothing is more clear than that, where a chattel is sold with a warranty, and it turns out to be different from the thing warranted, the vendee may rescind the contract (1): *Gompertz v. Denton* (2), *Street v. Blay* (3), *Patteshall v. Tranter* (4). To entitle the plaintiff to recover special damages, the plaintiff must show the act of the defendant to have been the natural and proximate, and not the remote cause of the damage. *Neale v. Wyllie* and *Smith v. Compton* turned upon the meaning in the special contracts. In *Fisher v. Fallows* (5), the defendant being arrested, the plaintiff and another person justified bail for him; the defendant absconded, and the bail employed a person to go in search of him; the party so employed demanded a sum of 12*l.* 12*s.* for his trouble and expenses, which not being paid, he sued the present plaintiff, who defended the action, but was ultimately compelled to pay the demand with costs: and it was held that, though the plaintiff was entitled to recover from the defendant (the bail) the expenses necessarily incurred in his apprehension, yet he could not charge him with the costs incurred in his *improvident defence of the former action. So, here, the jury having found that the defendant might, by the exercise of ordinary prudence, have discovered that the horse was unsound at the time he sold it to Jolly, the defence of that action was improvident and improper.

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Storks, Serjt., in support of his rule:

The question here is not whether Jolly had a right to return the horse, but whether the defence to Jolly's action was, under the circumstances, wanton, unreasonable, or speculative. An opportunity was given to the defendant to take back the horse or to defend the action. Notice, indeed, was not necessary.

(TINDAL, Ch. J.: How do you show any act of the defendant to fix him with the costs of your defence to Jolly's action?)

By paying into Court the price paid to him for the horse, the defendant admits that it was unsound at the time he sold it to

(1) This, though the common phrase, is hardly a correct expression: the purchaser cannot be said to rescind the contract by refusing to receive an article different from that which he contracted for; it is in truth a failure

on the part of the vendor to perform the contract.

(2) 1 Cr. & M. 207.

(3) 36 R. R. 626 (2 B. & Ad. 456).

(4) 42 R. R. 334 (3 Ad. & El. 103).

(5) 8 R. R. 843 (5 Esp. 171).

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the plaintiff. In *Lewis v. Peake* (1), it was expressly held, that, if the buyer of a horse with warranty, relying thereon, resells him with warranty, and being sued thereon by his vendee, offers the defence to his vendor, who gives no directions as to the action, the plaintiff, defending that action, is entitled to recover the costs thereof from his vendor, as part of the damage occasioned by his breach of warranty. *Green v. Greenbank* (2) was a decision to the same effect. In *Neale v. Wyllie* (3), where the assignee of an underlease containing a covenant to repair, suffered the premises to go out of repair, and the original lessor brought an action against the original lessee for the breach of a similar covenant contained in his lease; it was held that the damages and costs of that action, and also the costs of defending it, might be recovered as special damages in an action against the under-tenant for the breach of his covenant to repair. "Unless," says ABBOTT, Ch. J., "the plaintiff can recover those costs in this action, as well as the damages, he will be without remedy for an injury induced by the defendant's *breach of covenant." In *Smith v. Compton*, the defendant conveyed premises to the plaintiff, and covenanted for good title; an action of *formedon* was afterwards brought against the plaintiff by a party having better title, and the plaintiff compromised it for 550*l.*: and it was held that the plaintiff, in an action for the breach of covenant, might recover the whole sum so paid, and his costs as between attorney and client, in the compromised suit, though he had given no notice of that suit to the defendant; for, in an action on a general guarantie, the only effect of such want of notice to the indemnifying party, is, to let in proof on his part that the compromise was improvidently made. The want of notice there was not relied on as a defence in law, but was used as an answer on the merits. If notice was necessary, the defendants have had reasonable notice.

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Cur. adr. vult.

TINDAL, Ch. J.:

The only question in this case was, whether or not the plaintiff was entitled to recover as special damage the costs incurred in the defence of the action brought against him by Jolly for the breach of his warranty. The real point at the trial was, whether or not

(1) 17 R. R. 475 (7 Taunt. 153; 2 Marsh. 431).

(2) 17 R. R. 529 (2 Marsh. 485).

(3) 27 R. R. 418 (3 B. & C. 533; 5 Dowl. & Ry. 442).

the plaintiff might have known, by a reasonable examination of the horse, before he defended the action, that the animal was unsound at the time he sold it to Jolly; for, if so, the defence was a rash one, and the plaintiff not entitled to charge the defendant with the costs of such improvident defence. Mr. Baron PARKE reports to us that the plaintiff 'might by a reasonable examination have discovered the unsoundness, and that the 19l. paid into Court was a sufficient sum to cover the plaintiff's demand; and so the jury have found. We therefore think the rule must be discharged.

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Rule discharged.

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WRECK. See Sea and Sea Shore, 2.

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